ETHICAL GUARDRAILS TO UNBOUNDED PROCEDURE

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Civil lawsuits in federal courts—especially class actions and multidistrict litigation (MDL)—can be messy and complicated, calling for pragmatic interventions that lie beyond what is explicitly addressed by the existing rules. And flexibility is part of the genius of the Federal Rules of Civil Procedure. On the other hand, unbounded discretion and innovation in procedure can lead to illegitimate exercises of power, bias, democratic nonaccountability, and other serious harms. But the choice is not between providing individual courts with nearly limitless authority to experiment with procedure or having a set of rigid rules. Instead, there is a third path: district judges should look to ethics rules to define the boundaries of their discretion, especially when innovating with civil procedure.

The case for treating professional-conduct rules as guardrails to unbounded procedure begins with a recognition that federal district courts have almost universally adopted ethics codes modeled after the American Bar Association Model Rules of Professional Conduct through their local rulemaking. This comes with an important doctrinal payoff: judges cannot ignore these ethics rules when applicable. Moreover, even if the district courts had not already committed to them, professional-conduct rules have many normative advantages over unbounded procedure and, thus, would serve as useful guides.

The supervision of attorneys' fees in multidistrict litigation provides a helpful case study. MDLs have become the predominant battleground for important procedural disputes and are a paradigmatic example of unbounded procedure. Within MDLs, common-benefit fees are extremely controversial and legally tenuous. Several professional-conduct rules,

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however, directly address the substantive issues and offer established frameworks for regulating lawyers' compensation to ensure its reasonableness and fairness for everybody involved. Beyond this specific intervention, the key contributions of this Article are (1) putting civil procedure and professional responsibility into greater dialogue and (2) illustrating how professional-conduct rules are well positioned to fill many important gaps or otherwise guide judges' experiments.

INTRODUCTION

Civil lawsuits—especially class actions and multidistrict litigation (MDL)—can be messy and complicated, calling for pragmatic interventions that lie beyond what is explicitly addressed by the existing rules.[1] And part of the genius of the Federal Rules of Civil Procedure (FRCP) is their flexibility, which allows judges to apply their discretion and innovate to fill

1. *See* Lynn A. Baker & Andrew D. Bradt, *MDL Myths*, 101 TEX. L. REV. 1521, 1522 (2023); Allan Erbsen, *A Unified Approach to* Erie *Analysis for Federal Statutes, Rules, and Common Law*, 10 U.C. IRVINE L. REV. 1101, 1159–60 (2020).

the gaps that inevitably appear.[2] On the other hand, unbounded procedure can lead to illegitimate exercises of power, bias, democratic nonaccountability, and other serious harms.[3]

But the choice is not between providing trial courts with nearly limitless authority to experiment with procedure or having a set of rigid rules. Instead, the key is to determine the limits of judicial discretion and innovation, especially when there are difficult practical and normative tradeoffs.[4] Although there is no single solution to this thorny question, federal district judges should look to professional-conduct rules to define the boundaries of their discretion.

Professional-conduct rules are well suited to bounding procedural discretion and innovation without stifling them. Most critically, these ethics rules directly wrestle with the unavoidable tension between justice and efficiency while considering differing conceptions of the role of the lawyer in civil litigation both for individual clients and for society.[5] In so doing, they substantively address many procedural gaps, bringing the profession's accumulated wisdom to bear in a manner that is transparent, uniform, and democratically accountable—especially when compared with individual courts' ad hoc procedures.[6]

The absence of such guardrails may have contributed to the oft-criticized settlement in the Propulsid MDL.[7] In the early 1990s, the Food and Drug Administration (FDA) permitted Johnson & Johnson to market Propulsid, a drug that the company had designed and manufactured to relieve heartburn.[8] Surprisingly, the FDA approved Propulsid even after 2.4 percent of the trial participants experienced heart rate and rhythm disorders and eight young children died.[9] Less unexpectedly, thousands of lawsuits were brought

2. *See In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 677 (6th Cir. 2020); Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288 (2010); Richard Marcus, *The Litigation Superpower's Case Management Cure for Adversarial Ills*, 85 IUS GENTIUM 109, 110–11 (2021).

3. *See infra* Part III.

4. *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 71 (2019); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 58 (2021); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 113 (2015).

5. *See* Deborah L. Rhode, *Legal Ethics: Prime Time and Real Time*, 1 BERKELEY J. ENT. & SPORTS L. 113, 114 (2012); David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 973–78 (1998).

6. *See generally* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 772–73 (2017) (defining "ad hoc procedure").

7. *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORTS DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 2 (2019).

8. *See* David Willman, *Propulsid: A Heartburn Drug, Now Linked to Children's Deaths*, L.A. TIMES (Dec. 20, 2000, 12:00 AM), https://www.latimes.com/nation/la-122001propulsid-story.html [https://perma.cc/D4EP-HHLG].

9. *Id.*

against Johnson & Johnson for injuries related to Propulsid after it had been on the market for less than a decade.[10]

Under the authority provided by 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation consolidated the suits before one judge for pretrial management in an MDL.[11] Fewer than fifty of the more than six thousand plaintiffs recovered any money at all from the settlement and the total payout was under seven million dollars.[12] In stark contrast, the lawyers were paid approximately twenty-seven million dollars in common-benefit fees—a procedural innovation that is not explicitly authorized by any rule or statute.[13] And tens of millions of dollars earmarked for the settlement reverted to the defendant.[14]

How does this happen? In large part, this is a story of insider dealing driving MDL's flexible procedure.[15] But the Propulsid story also exemplifies three of the many problems that may arise from any unbounded procedure in federal litigation.

First, the legal basis for common-benefit awards in nonclass MDLs is highly tenuous even though such fees are regularly applied in that context.[16] Common-benefit fees are meant to compensate members of the plaintiffs' steering committee (PSC)—the lawyers who coordinate and otherwise lead the litigation—for work substantially benefiting MDL plaintiffs other than their clients even though those nonclient plaintiffs have their own lawyers (often referred to as "individually retained plaintiffs' attorneys" or IRPAs).[17] If not an outright departure from the "American Rule," common-benefit fees are undoubtedly an exception to the customary tradition requiring parties to bear their own costs when litigating in federal court.[18] Yet no federal rule or

10. *See In re* Propulsid Prods. Liab. Litig., 208 F.R.D. 133, 136–47 (E.D. La. 2002); *see also* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332–34 (2008).

11. *In re Propulsid*, 208 F.R.D. at 136–47.

12. BURCH, *supra* note 7, at 2.

13. *Id.* at 39.

14. *Id.*

15. *Id.* at 2.

16. *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1499 (2017); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014). This is described in further detail in Part IV.A.

17. *See* Fallon, *supra* note 16, at 373.

18. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975); *In re* Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 606 (1st Cir. 1992); *see also* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662.

statute explicitly authorizes them,[19] and the equitable bases for common-benefit fees are weak.[20]

Second, in the Propulsid MDL, all seven members of the PSC were white men,[21] which may reflect an all-too-common bias against racial minorities, women, and other historically disempowered groups who often have been excluded from such appointments.[22] This is particularly troubling in the Propulsid MDL where women probably comprised a disproportionately large percentage of the plaintiffs.[23] Additionally, the common-benefit fees likely reflect financial transfers from a more demographically diverse set of lawyers (i.e., the IRPAs for the individual MDL litigants) to the all-white, all-male PSC.[24]

Third, the use of common-benefit fees exemplifies the tendency of federal judges to focus on the problems of elite judges, lawyers, and parties instead of everyday litigants when applying their discretion or innovating with civil procedure.[25] In the Propulsid MDL, the settlement agreement removed a potentially onerous set of cases from the judge's docket, greatly enriched the lawyers, and limited the giant corporate defendant's liability for its unsafe product even as it offered scant relief to the plaintiffs.[26]

Ethics rules are not a panacea for lawyer misconduct, so it would be unfair to think that they can perfectly solve procedural questions that go beyond that ambit. Nevertheless, American Bar Association (ABA) Model Rules of Professional Conduct ("Model Rules") 1.5 and 1.16(b) embody longstanding legal principles that would limit common-benefit fees and better incentivize plaintiffs' lawyers in MDLs to focus on their clients' recovery.[27] Thus, these principles could have ameliorated some of the concerns arising out of the Propulsid MDL settlement.

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19. *See* Gluck & Burch, *supra* note 4, at 13–14; Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-district Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 120–21 (2010); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 356 (2014); Burch, *supra* note 4, at 102.

20. *See* David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 467 (2019); Charles Silver, *The Suspect Restitutionary Basis for Common Benefit Fee Awards in Multi-district Litigations*, 101 TEX. L. REV. 1653, 1658 (2023).

21. *See* Pretrial Order No. 3, 208 F.R.D. 133 (E.D. La. 2002) (listing the seven lead attorneys appointed in the Propulsid MDL). The author of this Article verified the attorneys' gender by the use of pronouns in their biographies and guessed their race based on their photos.

22. *See* David L. Noll & Adam S. Zimmerman, *Diversity and Complexity in MDL Leadership: A Status Report from Case Management Orders*, 101 TEX. L. REV. 1679, 1685 (2023).

23. *See* Walter Smalley, Deborah Shatin, Diane K. Wysowski, Jerry Gurwitz, Susan E. Andrade, Michael Goodman, K. Arnold Chan, Richard Platt, Stephanie D. Schech & Wayne A. Ray, *Contraindicated Use of Cisapride: Impact of Food and Drug Administration Regulatory Action*, 284 JAMA 3036, 3038 (2000).

24. *See* Noll & Zimmerman, *supra* note 22, at 1692–93.

25. *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1008 (2016).

26. *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 74–76 (2017).

27. *See infra* Part IV.

This Article's proposal connects and builds on several strands of civil procedure and professional responsibility scholarship. At its foundation, using professional-conduct rules to guide innovations or fill gaps within civil procedure is meant to mitigate the sort of accountability and equality concerns that Professor Judith Resnik identified in her article *Managerial Judges*.[28] Unbounded procedure may functionally require judges to innovate while simultaneously raising concerns over legal authority, bias, transparency, uniformity, predictability, error correction, and democratic nonaccountability.[29] Further, the MDL literature is concerned with the interrelationship of legal ethics and civil procedure with specific issues such as inventory settlements and attorneys' fees.[30] Less heralded, if no less significant, another line of scholarship examines district courts' local rules.[31] Finally, legal ethics scholars have extensively analyzed the role of professional-conduct rules in district courts.[32]

This Article makes several contributions to this literature. First, it makes a descriptive contribution by identifying changes in the federal judiciary's management of lawyers' professional conduct. Specifically, it explains how federal district courts now have near-universally adopted ethics codes modeled after the ABA Model Rules through their local rulemaking. This observation comes with a doctrinal payoff: notwithstanding many courts' practices, these ethics rules are binding. Following from this, this Article offers a framework wherein professional-conduct rules act as guardrails to unbounded procedure, ameliorating some of the latter's harms without sacrificing much of the benefit of flexibility. The tradeoffs of such an approach are explored both at the category level and through the specific example of the management of attorneys' fees in MDLs. This application of ethics rules to common-benefit fees might even resolve a high-stakes and contentious issue in contemporary American litigation.

Part I of this Article explains how, by design, the FRCP incorporates unbounded procedure for both better and worse. Part II examines the

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28. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

29. *See* Samuel P. Jordan, *Local Rules and the Limits of Trans-territorial Procedure*, 52 WM. & MARY L. REV. 415, 460 (2010); *see also infra* Part III.

30. *See, e.g.*, Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291 (2015) [hereinafter Baker, *Aggregate Settlements*]; Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 281 (2011); Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1962 (2017) [hereinafter Baker, *Mass Torts*]; Nancy J. Moore, *Ethics Matters, Too: The Significance of Professional Regulation of Attorney Fees and Costs in Mass Tort Litigation—A Response to Judith Resnik*, 148 U. PA. L. REV. 2209 (2000).

31. *See, e.g.*, Jordan, *supra* note 29; Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. CIV. RTS. & CIV. LIBERTIES 121 (2015); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989); Paul D. Carrington, *A New Confederacy?: Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 944–52 (1996); Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284, 1286 (1978).

32. *See, e.g.*, Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3 (2005); Fred Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

relationship between federal civil procedure and professional responsibility in the federal judiciary. Part III considers the general normative and practical costs and benefits of using professional-conduct rules to bind judicial discretion and innovation within civil procedure. Part IV specially applies the ethics framework to common-benefit fees in MDLs.

I. UNBOUNDED PROCEDURE

The FRCP is often celebrated for its pragmatic innovations, which were designed to enhance both case management and access to justice.[33] A key modernization was to leave room for judicial discretion and innovation in service of these goals. But, when this discretion is without limits, it can be fairly characterized as "unbounded procedure" that may be arbitrary, biased, opaque, or otherwise problematic.[34] This part begins by explaining how the FRCP incorporates aspects of unbounded procedure, identifying several types along with their costs and benefits. It then turns to federal multidistrict litigation, which is a paradigmatic example of unbounded procedure and provides the case study in Part IV.

A. Unboundedness in the Federal Rules of Civil Procedure

For better and worse, the FRCP incorporates unbounded procedure in several forms. First, a few rules—by their very text—function as a blank check for judges, doing virtually nothing to constrain a judge's discretion in addressing an ostensibly covered topic.[35] Second, even where the text of a rule does not explicitly vest nearly unfettered power in judges, common law and practice might create a wide range of possibilities by interpreting terms like "reasonable."[36] Third, no set of rules will cover every situation. As one of the drafters of the FRCP commented, "[S]ome case is going to come up where there is no rule. What is the judge to do?"[37] Taken together, judges will invariably face procedural situations that may require the use of broad discretion and innovation.

The vast judicial discretion permitted by the FRCP—and even some of the gaps that it leaves—is viewed as a feature, not a bug, of the system. In the face of mounting docket pressures, "managerial judging" has become the norm, with judges pushing their discretion to encourage the quick resolution

33. *See* Marcus, *supra* note 2, at 110–11; *see also* Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249, 2251 (2017).

34. *See generally* Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. 933, 979 (2018); *see also infra* Part III.

35. *See* Erbsen, *supra* note 1, at 1157 (identifying Rule 42(a)(3)).

36. *See* Hyman & Silver, *supra* note 5, at 972.

37. Erbsen, *supra* note 1, at 1159 (citing 6 ADVISORY COMM. ON RULES FOR CIV. PROC., PROCEEDINGS OF MEETING OF ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES 1515 (1936), https://www.uscourts.gov/sites/default/files/fr_import/CV02-1936-min-Vol6.pdf [https://perma.cc/DQA9-2A5E] (comment by Monte Lemann)).

of cases through settlement or pretrial dispositive motions.[38] Many district judges have acknowledged these realities, with one noting that "the exigencies of modern dockets demand the adoption of novel and imaginative means."[39] This is especially true with complex litigation.[40]

Unbounded procedure also may let district courts function as Justice Louis D. Brandeis's laboratories of innovation.[41] Scholars have considered how variations in state procedure may uncover advantages or detriments in various approaches to civil procedure devices like heightened pleading standards.[42] Similarly, variations in local rules across the district courts can serve the same function within the federal judiciary.[43] And there are historical examples in which individual federal judges' practices diffused throughout the judiciary, ultimately leading to formal amendments to the FRCP.[44]

The pragmatic benefits of unbounded procedure are not cost free. As the scholarship on managerial judging has explained, unbounded procedure lacks the legitimacy of an anchoring rule or law.[45] And its application can be highly arbitrary without any transparent, uniform analytic framework to guide a judge's discretion or innovation.[46] Part III goes deeper into the benefits of using ethics rules as guardrails and impliedly extends these critiques of unbounded procedure.

To make this idea of unbounded procedure more concrete, two examples are briefly described below. The brief sketches do not delve deeply into exactly how the professional-conduct rules would apply. Instead, they illustrate the sorts of unbounded procedure—beyond the case study in Part IV—that exist within the FRCP and could be constructively addressed by this Article's proposal to safeguard judicial discretion and innovation in civil procedure with professional-conduct rules.

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38. *See* Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1267–69 (2010) (citing Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 167 (1997)).

39. Lockhart v. Patel, 115 F.R.D. 44, 47 (E.D. Ky. 1987).

40. *See, e.g.*, United States v. Reaves, 636 F. Supp. 1575, 1579–80 (E.D. Ky. 1986).

41. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

42. *See, e.g.*, Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 746 (2016); Glenn S. Koppel, *Toward A New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1176 (2005).

43. *See, e.g.*, A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991); Xuan-Thao Nguyen, *Dynamic Federalism and Patent Law Reform*, 85 IND. L.J. 449, 477–78 (2010).

44. *See, e.g.*, Engstrom, *supra* note 34, at 946–47 (describing the change to Rule 16 to permit time limits on trials).

45. *See* Thornburg, *supra* note 38, at 1269–70 (citing Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 548 (1986)).

46. *See id.* at 1270 (citing E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 316–17 (1986)).

Let us begin with an example that likely is familiar to most readers: Federal Rule of Civil Procedure ("Rule") 8(b) requires civil complaints to include "a short and plain statement of the claim showing that the pleader is entitled to relief."[47] At first blush, this provision does not exhibit any exceptional ambiguity. And, for many years, district courts interpreted it to mean that dismissal was warranted only if it was "beyond doubt that the plaintiff [could] prove no set of facts in support of [their] claim which would entitle [them] to relief."[48] This was effectively a categorical rule.[49] Then, in *Ashcroft v. Iqbal*,[50] the U.S. Supreme Court held that the factual allegations in a complaint must be "plausible" as determined by the district judge's application of their "judicial experience and common sense."[51] This new, amorphous, standard-like version of Rule 8(b) has been roundly criticized for vesting virtually "unbounded discretion" in the trial courts.[52] On the one hand, such latitude has arguably contributed to the now much higher rates of dismissals for employment and civil rights cases, which may indicate the infusion of some racial bias into the judicial decision-making process.[53] On the other hand, district judges can presumably still use their judicial experience and common sense to deny motions to dismiss at a higher rate or use the myriad of discretionary discovery tools to offset the harsh *Iqbal* gloss to Rule 8(b).[54] No matter one's policy preference, the vast discretion in the *Iqbal* approach could be made more uniform and predictable if it were substantively guided by Rule 11[55] and ABA Model Rule of Professional Conduct ("Model Rule") 3.1, which address nonmeritorious filings.[56]

Federal courts also innovate with procedure, even in relatively simple cases in which there are no unusual or complex issues as might be encountered in aggregate litigation. For example, in response to

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47. FED. R. CIV. P. 8(b).

48. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 670 (2009) ("Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test . . . .").

49. *See, e.g.*, Gen. Ins. Co. of Am. v. Clark Mall Corp., 738 F. Supp. 2d 864, 865 (N.D. Ill. 2010) ("*Twombly* and *Iqbal* sounded the death knell for the rote recitation pleading that prevailed under *Conley v. Gibson*.").

50. 556 U.S. 662 (2009).

51. *Id.* at 679.

52. *See, e.g.*, Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in* Ashcroft v. Iqbal, 62 FLA. L. REV. 951, 953 (2010).

53. *See* Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 614 (2012); Suzette M. Malveaux, *Is It Time for a New Civil Rights Act?: Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2413–14 (2022); Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 UC IRVINE L. REV. 187, 200–07 (2013); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122 (2015).

54. *See* Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 506–10 (2010).

55. FED. R. CIV. P. 11.

56. *See* Benjamin P. Cooper, Iqbal*'s Retro Revolution*, 46 WAKE FOREST L. REV. 937, 948 (2011); Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1211 (2014) (citing Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 489 (2011)).

overcrowded dockets in the 1980s, district courts began to experiment with nonbinding summary jury trials to aid settlement discussions.[57] This procedural innovation had the lawyers present their respective views of the case and witness statements to a lay jury and receive the jury's advisory decision.[58] But no rule explicitly authorizes courts to compel parties to participate in alternative dispute resolution proceedings in that manner.[59] Instead, courts generally referenced Rule 16 as the source of their authority to create this new procedure.[60] At the time, Rule 16(a) empowered courts to require lawyers "to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action . . . and . . . (5) facilitating the settlement of the case."[61] But the rule's text only contemplated discussions of "extrajudicial procedures."[62] Although no professional-conduct rule is directly on point, ABA Model Rule of Professional Conduct 3.2 calls for expediting litigation and the associated case law might have proved useful for considering tradeoffs between efficiency and justice.[63] Additionally, ABA Model Rule of Professional Conduct 3.3's candor-to-the-tribunal requirement could have guided these judges' implementation of summary jury trials because it dictates that lawyers must advance their best evidence or arguments to avoid strategic surprises at the real trial if no settlement is reached.[64]

B. MDLs as a Paradigm of Unbounded Procedure

Examples of unbounded procedure can be found everywhere, but MDLs are especially fertile ground. MDLs were designed to enhance judicial efficiency in response to concerns about litigation run amok by giving judges the power to innovate with procedure.[65] Within a few decades, MDLs went from a "judicial backwater" to a stunning success.[66] MDLs now comprise a significant portion of the federal docket with estimates reaching almost as high as 40 percent.[67] They also frequently feature cases involving important

57. *See* Judge Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 468 (1984).

58. *Id.*

59. *Id.*

60. *See, e.g.*, Fed. Rsrv. Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603, 604 (D. Minn. 1988).

61. *See, e.g.*, Strandell v. Jackson Cnty., 838 F.2d 884, 885–86 (7th Cir. 1987).

62. *See* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 385–86 (1986).

63. *See* MODEL RULES OF PRO. CONDUCT r. 3.2 (AM. BAR ASS'N 2024).

64. *See id.* r. 3.3; Posner, *supra* note 62, at 374.

65. *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 840 (2017).

66. *See* Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1719 (2019); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013).

67. *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 846 (2017). *But see* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1306–07, 1314–16 (2020).

public policy issues such as the distribution of opioids.[68] To further give a sense of scale, some high-profile mass tort cases involve the distribution of hundreds of millions and even billions of dollars through MDL-brokered settlements.[69]

Professor Andrew Bradt's article, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, provides a thorough account of the history of MDLs that is highly recommended for any reader who would like more background on the subject.[70] For this Article's purpose, the story begins in 1961 when "massive antitrust litigation involving the electrical-equipment industry . . . threatened to overwhelm the federal courts."[71] Almost 2,000 cases were filed with more than 25,000 individual claims.[72] In response, then-Chief Justice Earl Warren appointed a committee that ultimately proposed consolidating discovery before a few judges.[73] Although coordinating discovery was entirely voluntary, most of the district judges went along with it.[74] This pilot effort established some procedures that have become standard in modern MDLs, including the appointment of a PSC, central document depositories, sequenced discovery, and large-scale settlement discussions.[75] And it was largely successful, encouraging the committee to make its efforts permanent by enshrining it in a statute that would not be subject to either Rules Enabling Act[76] objections or the tinkering of the Rules Committees.[77] By the end of the decade, Congress passed the Multidistrict Litigation Act of 1968.[78] This statute, codified at 28 U.S.C. § 1407, authorizes the transfer of actions that involve one or more common questions of fact to a single district for coordinated or consolidated proceedings under the auspices of a panel of federal judges.[79]

Professor Bradt explains that the "guiding light of the judges' efforts was their perception that power over litigation must be centralized in the hands of a single judge with national authority and maximum flexibility."[80] This principle is driven by the judges' notion that MDLs cannot be subjected to a

68. *See* Clopton, *supra* note 67, at 1298.

69. *See* Christopher B. Mueller, *Taking A Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 U. KAN. L. REV. 531, 534 (2017) (referencing the Agent Orange, Vioxx, and Zyprexa MDLs).

70. *See generally* Bradt, *supra* note 65.

71. *Id.* at 854; *see also* Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515 (1996).

72. *See* Bradt, *supra* note 65, at 855.

73. *Id.* at 856.

74. *Id.* at 857.

75. *Id.* at 857–59.

76. 28 U.S.C. § 2071.

77. *See* Bradt, *supra* note 65, at 863–64.

78. Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407); Bradt, *supra* note 65, at 842.

79. *See* 28 U.S.C. § 1407.

80. Bradt, *supra* note 65, at 840.

uniform set of rules because, as one MDL judge put it, "Like snowflakes, no two MDLs are exactly alike."[81]

Additionally, when faced with potentially hundreds or thousands of lawsuits combined into an MDL, if district courts were to apply the normal FRCP, there would be only limited economies of scale following from the centralization of the litigation.[82] Accordingly, the MDL statute essentially puts legitimately complex pretrial management problems in the hands of a district court without any specific directions on how to solve it other than to use "coordinated or consolidated" proceedings.[83]

If each MDL is viewed as presenting a unique set of pressing coordination issues with limited instruction, it is no surprise that judges believe that they must have the authority to create bespoke procedures to solve them. And Congress and the Rules Committees have largely acquiesced to this understanding. Section 1407 provides no instruction on how to manage the consolidation or coordination of the transferred cases and the FRCP does not contain any MDL-specific provisions that constrain the MDL courts' management of their cases.[84] Moreover, appellate oversight is rare, further adding to the discretion vested in the MDL courts.[85] Even the proposed MDL-specific Rule 16.1 only covers a few areas, which will inevitably require judges to create or adopt procedures outside of its text.[86]

Within this context of unbounded procedure, MDL judges create PSCs, disburse common-benefit awards, require plaintiffs to make early factual showings as to their injuries, and use other ad hoc procedures to effectively manage MDLs.[87] In the absence of more prescriptive authority, judges liberally construe Rule 16's case management provisions while borrowing from their experience with other sorts of cases, past MDL management, and the work of their colleagues to craft such ad hoc procedures.[88] Although

81. *See In re* Gen. Motors, LLC Ignition Switch Litig., No. 14-MD-2543, 2015 WL 3619584, at *8 (S.D.N.Y. June 10, 2015); *see also* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1674 (2017); Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 99 (2018).

82. *See* Bookman & Noll, *supra* note 6, at 794; Clopton, *supra* note 67, at 1314–16; Howard M. Erichson, *The Role of the Judge in Non-class Settlements*, 90 WASH. U. L. REV. 1015, 1015–16 (2013).

83. 28 U.S.C. § 1407; *see also* Engstrom, *supra* note 4, at 7.

84. *See* Bookman & Noll, *supra* note 6, at 794; Clopton, *supra* note 67, at 1314–16; Gluck, *supra* note 81, at 1688; Dodge, *supra* note 19, at 355.

85. *See* Gluck, *supra* note 81, at 1669; Silver & Miller, *supra* note 19, at 119.

86. *See* ADVISORY COMM. ON CIV. RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES MARCH 28, 2023, at 110–18 [hereinafter MARCH 28, 2023 MEETING], https://www.uscourts.gov/sites/default/files/2023-03_civil_rules_committee_agenda_book_final_0.pdf [https://perma.cc/CH3V-FCRK]. Earlier versions included specific language about compensating PSCs through common-benefit funds. *See* ADVISORY COMM. ON CIV. RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES OCTOBER 12, 2022, at 174 [hereinafter OCTOBER 12, 2022 MEETING], https://www.uscourts.gov/sites/default/files/civil_agenda_book_october_2022_final.pdf [https://perma.cc/GZX8-CHYS].

87. *See* Gluck, *supra* note 81, at 1688.

88. *Id.*

these sources might educate courts about helpful practices,[89] they do little to formally constrain innovations that might go too far afield or replicate mistakes of law.[90] In sum, MDLs are procedural Swiss cheese.

Still, just like Emmental is popular with the cheese-eating public,[91] MDLs have been a hit with federal judges and many lawyers.[92] Judges like them because MDLs and their procedural flexibility are an effective tool for managing mass torts that would otherwise involve lots of time and repetitious work.[93] Plaintiffs' attorneys might find them attractive because of the possibility of generating economies of scale and securing a peace premium from defendants.[94] Defense attorneys presumably benefit from the greater finality and efficiency of a single proceeding.[95]

Given their significance and the lack of formal procedural rules, MDLs have become a battleground for academics who debate whether courts have struck the correct balance between the efficiencies of aggregate litigation and due process protections for the plaintiffs.[96] The rhetoric can run hot, with one article characterizing MDLs as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the Godfather movies."[97] On the other side, some scholars note the pragmatic necessity of MDLs to permit courts to address nationwide mass torts without being overwhelmed in addition to the party benefits noted above.[98] Additionally, more recent literature has explored whether § 1407 is "a congressional grant

89. *See* Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 557 (2016); Elizabeth Y. McCuskey, Horizontal Procedure 41–43 (2017) (unpublished manuscript) (on file with author).

90. *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1638–70 (2020).

91. *See generally* Press Release, Menafn, Emmental Cheese Market Size Is Projected to Reach US$ 2.47 Billion by 2032, Growing at a CAGR of 4.3%: Insightslice (Apr. 19, 2023), https://menafn.com/1106045004/Emmental-Cheese-Market-Size-Is-Projected-To-Reach-US-247-Billion-By-2032-Growing-At-A-CAGR-Of-43-Insightslice [https://perma.cc/M844-ZDHL].

92. *See* Bradt, *supra* note 65, at 845; Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 799 (2019).

93. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 426–27 (2001); Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 937–38 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1363–64 (1995); *see also* James A. Henderson, Jr., Comment, *Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021 n.39 (1995).

94. *See* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 413–14 (2014).

95. *See id.*

96. *See* Bradt, *supra* note 65, at 845; Gluck, *supra* note 81, at 1709–10; Ronen Avraham & William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1, 10–11 (2022).

97. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015); *see also* David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545, 548–50 (2017).

98. *See, e.g.*, Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1220 (2018); Cabraser & Issacharoff, *supra* note 67, at 875; Baker & Bradt, *supra* note 1, at 1522.

of jurisdiction to the federal courts . . . sufficient to authorize the courts to create substantive rules of decision," analogizing to the Sherman Act.[99]

II. ETHICS RULES IN FEDERAL PROCEDURE

This part explores the existing relationship between federal civil procedure and professional responsibility. It details the overlap between the two subjects. It then identifies how professional-conduct rules are currently integrated into federal civil procedure, albeit in a patchwork fashion with aspects of both uniformity and difference. Additionally, this part explains how state ethics rules are part of the federal judiciary's positive procedural law, which is a key doctrinal point that has been generally disregarded by courts and scholars. Finally, it identifies where scholars and district courts previously have identified tensions or synergies between MDL procedures and legal ethics more specifically. Together, this descriptive work illustrates how this Article's proposal is supported by an understanding that professional-conduct rules already are (or should or must be) part of federal district courts' toolkits and lays the foundation for the case study of fee management in MDLs in Part IV.

A. Subject-Area Overlap

It has long been recognized that civil procedure and professional responsibility are complementary areas of law because they both regulate the conduct of lawyers and, as part of their mission, seek to limit abusive litigation tactics.[100] Sometimes, the substantive overlap makes the procedural and ethics rules effectively coextensive. For example, Rule 11 and ABA Model Rule of Professional Conduct 3.1 use similar language to prohibit lawyers from filing nonmeritorious lawsuits.[101] Thus, a violation of one rule usually is a violation of the other.[102] Similarly, Rule 26(g) and Model Rule 3.4(d) both prohibit frivolous discovery requests or responses.[103] In sum, as one district court asserted, it is possible that "the abuse or misuse

99. 15 U.S.C. § 1; Jennifer E. Sturiale, *The Other Shadow Docket: The JPML's Power to Steer Major Litigation*, 2023 U. ILL. L. REV. 105, 126–27.

100. *See* Howard M. Erichson, *Civil Procedure and the Legal Profession*, 79 FORDHAM L. REV. 1827, 1827 (2011); Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 768–69 (2004); McMorrow, *supra* note 32, at 10 (citing Richard G. Johnson, *Integrating Legal Ethics and Professional Responsibility with Federal Rule of Civil Procedure Rule 11*, 37 LOY. L.A. L. REV. 819, 823 (2004); Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959; Richard H. Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics—the Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625, 626–29 (1982)); Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 50–51 (2015); Heidi Li Feldman, *Enriching the Legal Ethics Curriculum: From Requirement to Desire*, 58 LAW & CONTEMP. PROBS. 51, 51, 55 (1995).

101. *See* Andrew M. Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965, 1965–66 (2011); Joy, *supra* note 100, at 799.

102. *See In re* Boone, 7 P.3d 270, 280 (Kan. 2000).

103. Perlman, *supra* note 101, at 1972–73.

of any rule of civil procedure is a violation of the spirit of the rules of professional ethics on the most basic level."[104]

Yet not every form of professional misconduct implicates the workings of civil litigation. For example, Model Rule 1.17 permits the sale of a law practice, which simply acknowledges that a law practice is an alienable business just like any other commercial concern.[105] Additionally, the ABA Model Rules of Professional Conduct explicitly deny that violations of the rules should necessarily lead to judicial sanctions.[106] But this disclaimer is frequently rejected by courts.[107] Moreover, as a functional matter, "one cannot fully understand the problems of civil litigation without taking both [how the litigation process should work and how lawyers should conduct themselves] into account."[108] Consonantly, prominent reformers such as Professor Resnik have suggested that efforts to change civil procedure should engage with the professional responsibility issues, squarely considering "what attorney conduct is to be countenanced and what is to be penalized."[109]

Although both subject areas have extensive written codes, they also heavily rely on professional norms—and the substantive overlap means that these informal customs are cross-reinforcing.[110] This entwinement follows from the simple proposition that federal civil procedure is not a machine that runs itself.[111] Rather, as implicitly recognized in Rule 1,[112] the administration of civil justice depends on the ethical participation of judges, lawyers, and all parties.[113] The reliance on the cooperation of lawyers is made all the more compelling by how much of civil litigation happens away from the watchful eye of the presiding judge.[114]

Even so, judges remain the primary, frontline regulators of civil litigation, and the duty to police professional misconduct through sanctions is viewed

104. Blanchard v. EdgeMark Fin. Corp., 175 F.R.D. 293, 304 (N.D. Ill. 1997).

105. *See* Barton T. Crawford, *The Sale of a Legal Practice in North Carolina: Goodwill and Discrimination Against the Sole Practitioner*, 32 WAKE FOREST L. REV. 993, 994 (1997).

106. *See* MODEL RULES OF PRO. CONDUCT Scope ¶ 20 (AM. BAR ASS'N 2024); McMorrow, *supra* note 32, at 34–35; Johnson, *supra* note 100, at 902.

107. *See, e.g.*, United States v. Bullock, 642 F. Supp. 982, 984 (N.D. Ill. 1986).

108. Erichson, *supra* note 100, at 1832.

109. Resnik, *supra* note 45, at 548–49; *see also* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 390–91 (1996); Lindsey D. Blanchard, *Rule 37(a)'s Loser-Pays "Mandate": More Bark Than Bite*, 42 U. MEM. L. REV. 109, 137 (2011).

110. *See* Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. 981, 990–91 (2023); Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1426 (2004).

111. *See* Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 164–65 (2010).

112. FED. R. CIV. P. 1.

113. *See* FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.

114. *See* Wald, *supra* note 111, at 164–65; McMorrow et al., *supra* note 110, at 1426; Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1563 (2003).

as a necessary adjunct to that role.[115] For over two hundred years, the Supreme Court has recognized that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[116] Additionally, the Court has expressed its approval of the lower courts' authority to sanction misconduct as part of their inherent powers to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[117] Courts may use informal sanctions such as publicly naming and shaming lawyers in written orders too.[118] Even though they carry no direct, concrete penalty (unlike a monetary fine), these informal sanctions negatively impact the lawyers' reputations and, ultimately, lead to some market penalty as clients look for other counsel.[119]

Two descriptive trends further reinforce the link between civil procedure and professional responsibility. First, Rule 11's prohibition on groundless filings prompted a flurry of court decisions and scholarship analyzing the relationship between the procedural and professional-conduct rules.[120] Second, an empirical study found that judge-applied sanctions for attorney misconduct were frequently commensurate with the court's perception of the extent of harm to either the functioning of the individual case or to the overall operation of the judicial system.[121] So, although there is research suggesting that judges do not perceive themselves as in the business of meting out professional discipline, judges' choice of sanctions implicitly acknowledge civil procedure's dependence on appropriate professional conduct.

B. Federal Courts' Management of Professional Conduct

The federal district courts have a hodgepodge system of supervising the professional conduct of the lawyers who appear before them. The picture is complicated because state courts traditionally have primary responsibility for

115. *See* McMorrow et al., *supra* note 110, at 1426; *see also* Emily S. Taylor Poppe, *Evidence-Based Promulgation: Reconsidering the Rulemaking Process for Rules of Professional Conduct*, 89 FORDHAM L. REV. 1275, 1275–76 (2021). This power to sanction for misconduct before it, though, remains distinct from the power to employ professional discipline lawyers, which remains in the state authorities. *See* Wald, *supra* note 111, at 161–62.

116. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821); Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); *see also* McMorrow et al., *supra* note 110, at 1440.

117. Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962); *see also* Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 47–49 (2008); Michael Thomas Murphy, *Just and Speedy: On Civil Discovery Sanctions for Luddite Lawyers*, 25 GEO. MASON L. REV. 36, 56 (2017); Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 56 (2011); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 409 (2002).

118. McMorrow et al., *supra* note 110, at 1453; Joseph P. Mastrosimone, *Benchslaps*, 2017 UTAH L. REV. 331, 361.

119. *See* Wald, *supra* note 111, at 150–53.

120. *See* McMorrow, *supra* note 32, at 6–7.

121. McMorrow et al., *supra* note 110, at 1453.

regulating attorneys, but the Supreme Court has explicitly stated that a "state code of professional responsibility does not by its own terms apply to sanctions in the federal courts."[122] Lacking its own uniform set of professional-conduct rules, federal courts must regulate any attorney (mis)conduct they encounter as part of their unavoidable managerial duties, such as overseeing a motion to withdraw.[123]

Federal courts govern attorneys conduct in many ways, drawing from the U.S. Constitution, federal statutes, state law, guidance from industry groups, and federal rules and regulations.[124] From this array of authorities, some professional-conduct rules—such as those that follow from the Constitution—are uniform across all ninety-four district courts. Other professional-conduct rules may vary significantly from court to court, especially when looking at their de jure source rather than their specific content. But, once one drills down to the actual substance of the rules, there often is a significant amount of de facto uniformity. Moreover, the overarching point is that this Article's proposal is not drawing on a blank canvas. Federal district courts do—or, perhaps, should or must—understand how to integrate rules of professional conduct into their application of the procedural rules.

At first blush, the federal professional-conduct rules seem extremely balkanized. Despite past efforts, the federal district courts do not have a uniform set of ethics rules governing attorney conduct.[125] Instead, they are free to adopt their own professional-conduct rules.[126] And, while only one district currently has its own unique set of rules,[127] a significant majority of districts have adopted their home-state rules of professional conduct, which, naturally, are not a single, formally identical set of rules.

The lack of federal uniformity came to light in 1995 when the Judicial Conference of the United States (the "Judicial Conference")—the national policymaking body for the federal courts—conducted a study which found that the ninety-four district courts drew their rules of professional conduct from a number of different sources.[128] In terms of source type, seventy of

122. *In re* Snyder, 472 U.S. 634, 645 n.6 (1985).

123. *See* McMorrow, *supra* note 100, at 980–81.

124. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 802–03 (1992).

125. *See* John S. Dzienkowski & John M. Golden, *Reasoned Decision-Making for Legal Ethics Regulation*, 89 FORDHAM L. REV. 1125, 1132 (2021); Linda S. Mullenix, *Multiforum Federal Practice: Ethics and* Erie, 9 GEO. J. LEGAL ETHICS 89, 98–101 (1995); Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149, 150–51 (2000); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 463–64 (1996); Trippe S. Fried, *Licensing Lawyers in the Modern Economy*, 31 CAMPBELL L. REV. 51, 59 (2008).

126. *See* Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 384–85 (1963); Theard v. United States, 354 U.S. 278, 282 (1957); *see also* 28 U.S.C. § 2071; FED. R. CIV. P. 83.

127. *See* S.D. CAL. CIV. LOC. R. 2.1.

128. McMorrow, *supra* note 32, at 6 (citing Daniel R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts*, *in* WORKING PAPERS OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 3 (1997)).

the district courts relied, at least partially, on the rules from the state in which the courts sit.[129] But the underlying state rules varied widely too—at the time, only thirty-eight of the states had rules based on the ABA Model Rules of Professional Conduct, with twelve states retaining rules based on the older ABA Model Code of Professional Responsibility ("Model Code").[130] Adding to this mélange of authority, ten district courts had adopted the ABA rules directly, eleven had no professional-conduct rules at all, two followed California's unique state scheme, and one had crafted its own.[131]

The variation in professional-conduct rules across the federal courts was increasingly problematic due to several factors.[132] Chief among these considerations was the increase in multistate practice and transactions, which raised the specter of conflicting rules and larger compliance costs.[133]

In response to such concerns, the Judicial Conference proposed a uniform set of professional-conduct rules—but this was quickly rejected because relatively few professional-conduct issues were then commonly litigated and the state courts maintained a strong interest in retaining primary responsibility.[134] The voluntary "Federal Rules of Disciplinary Enforcement" also yielded limited uptake.[135] Instead, the vast majority of districts courts moved towards "dynamic conformity" by adopting their home-state professional-conduct rules.[136] Although they retain their own unique character, the underlying state rules are more uniform today too because they all are based on the Model Rules.[137]

Despite the lack of a uniform professional-conduct code, any local rulemaking or adoption of state standards by district courts remains subject to the constraints of federal law.[138] As such, federal laws and regulations provide some limited national standards governing professional conduct in the district courts.

Starting at the top, provisions of the Constitution have been interpreted as setting standards for attorney behavior. For example, the Supreme Court has recognized that the Sixth Amendment necessarily sets outer bounds to acceptable representation in criminal cases even if the underlying concern is about ensuring a fair trial rather than establishing a constitutional code of

129. *See id.*

130. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR. ASS'N. (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/4DV8-8EY3].

131. *See* McMorrow, *supra* note 32, at 11.

132. *See* Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123, 124 (2011); *Mullenix*, *supra* note 125, at 106.

133. *See* Zacharias, *supra* note 32, at 345.

134. *See* McMorrow, *supra* note 32, at 17.

135. *See id.*

136. *See id.* at 18.

137. *See Alphabetical List of Jurisdictions Adopting Model Rules*, *supra* note 130.

138. *See* Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 384–85 (1963) (discussing federal supremacy); Theard v. United States, 354 U.S. 278, 282 (1957); *see also* 28 U.S.C. § 2071; FED. R. CIV. P. 83.

professional conduct.[139] Federal constitutional decisions also have influenced the interpretation of the underlying state rules even when the respective substance of the decision and rule were reconcilable. Consider Model Rule 3.8(d) and most of its state analogues, which require prosecutors to disclose "*all* evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[140] Despite this, many states have determined that the prosecutors only have to turn over *materially* exculpatory or mitigating evidence—that is, just a subset of the information called for by the Model Rule—to be consistent with the leading Supreme Court decision on prosecutors' constitutional obligations to the defense.[141]

Federal statutes and subject-specific regulations may also create national standards for professional conduct. In the wake of the Enron financial scandal, Congress directed the Securities and Exchange Commission (the "Commission") to establish "standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers," resulting in regulations that require, among other things, attorneys to report evidence of material securities violations up to the chief legal counsel or chief executive officer of the company.[142] Similar regulations govern attorney conduct in a variety of contexts under the purview of the federal administrative state, including immigration, tax, intellectual property, veteran affairs, and labor law.[143] More indirectly, federal statutes can set incentives for attorney conduct that effectively create a national standard. For example, the Hyde Amendment[144] permitted district courts to award attorneys' fees to prevailing defendants in cases of "bad faith" federal prosecutorial misconduct.[145]

Also, as noted above, several of the trans-substantive rules in the FRCP are, in essence, professional-conduct standards (even if discipline is not their ultimate purpose). By providing for the sanctioning of lawyers for filing frivolous pleadings and motions, Rule 11 "gave federal district courts express authority to take greater control over the conduct of attorneys appearing in

139. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984); Diaz v. Comm'r of Corr., 279 A.3d 147, 164 (Conn. 2022); *see also* John H. Blume & W. Bradley Wendel, *Coming to Grips with the Ethical Challenges for Capital Post-conviction Representation Posed by* Martinez v. Ryan, 68 FLA. L. REV. 765, 773 (2016).

140. MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2024) (emphasis added).

141. *See* Justin Murray & John Greabe, *Disentangling the Ethical and Constitutional Regulation of Criminal Discovery*, HARV. L. REV. BLOG (June 15, 2018), https://harvardlawreview.org/blog/2018/06/disentangling-the-ethical-and-constitutional-regulation-of-criminal-discovery/ [https://perma.cc/94MK-UBDC].

142. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245; 17 C.F.R. § 205 (2023); *see* Press Release, Sec. and Exch. Comm'n, SEC Adopts Attorney Conduct Rule Under Sarbanes-Oxley Act (Jan. 23, 2003), https://www.sec.gov/news/press/2003-13.htm [https://perma.cc/BJ59-QVU3]; Coquillette & McMorrow, *supra* note 132, at 133–35.

143. *See* Coquillette & McMorrow, *supra* note 132, at 135–43.

144. 18 U.S.C. § 3006A.

145. *See* Green & Zacharias, *supra* note 117, at 403.

federal court"[146] and undoubtedly serves as a "disciplinary tool."[147] Rule 11's substantive commands also set the discussion for what constitutes attorney misconduct as it relates to such filings, providing a persuasive federal "vision of lawyering."[148] Rule 26(g) and Rule 37 operate similarly with discovery violations.[149]

These overarching federal authorities, though, are not the same as a comprehensive set of professional-conduct rules. Still, the de jure balkanization of the federal district courts' adopted rules of professional conduct should not overshadow the significant de facto uniformity. The Model Rules provide the basic blueprint for the professional-conduct rules in all fifty states, the District of Columbia, and all the territories other than Puerto Rico.[150] Mitigating that potential divergence, the District of Puerto Rico's local rules adopt the Model Rules, not its home-territory rules of professional conduct.[151] Accordingly, through their respective local rules, eighty-eight district courts have a shared lineage, rooted in the ABA template.[152] And this likely understates the amount of convergence in the district courts.

Six districts initially look like outliers. The Southern District of California has its own code, and the local rules of the District of Nebraska, District of North Dakota, Western District of Michigan, District of South Dakota, and the Western District of Wisconsin do not include any references to specific professional-conduct rules.[153] But the history and practice of these districts link back to their respective home-state rules. Through 2014, the Southern District of California's local rules incorporated California's professional-conduct rules, suggesting that the Southern District of California's actual application might continue to follow the home-state approach and be served by the deliberation of the California rules. This appears, in fact, to be the case. For example, in 2023, the U.S. District Court for the Southern District of California noted that "[w]ithdrawal of counsel is governed by the standards of professional conduct required of members of the State Bar of California" and applied that criteria.[154] Similarly, the Western District of Michigan's local rules integrated its home-state rules of professional conduct through 2018 when a new set of local rules were

146. McMorrow, *supra* note 100, at 959–60.

147. *Id.* at 972; *see also* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 564 (1991) (Kennedy, J., dissenting).

148. McMorrow, *supra* note 100, at 973, 976.

149. *See* David R. Hague, *Fraud on the Court and Abusive Discovery*, 16 NEV. L.J. 707, 731 (2016); Blanchard, *supra* note 109, at 137.

150. *See Alphabetical List of Jurisdictions Adopting Model Rules*, *supra* note 130; *see also* Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1452 (2004).

151. *See* D.P.R. CIV. LOC. R. 83E(a).

152. *See infra* notes 182–84.

153. S.D. CAL. CIV. LOC. R. 2.1; D. NEB. CIV. R. 1.1–85.1; D.N.D. GEN. LOC. R. 1.1–1.12; D.N.D. CIV. L.R. 3.1–72.1; W.D. MICH. LOC. GEN. R. 1–4; W.D. MICH. LOC. CIV. R. 1–83; D.S.D. LOC. R. CIV. PRAC. 1.1–83.1; W.D. WIS. LOC. R. 1–5.

154. Chandler v. Midland Credit Mgmt., Inc., No. 22-cv-00636, 2023 WL 174976, at *1 (S.D. Cal. Jan. 12, 2023).

adopted that were silent on the issue.[155] Nevertheless, in 2021, the U.S. District Court for the Western District of Michigan asserted, "Attorneys practicing before this Court are subject to the Michigan Rules of Professional Conduct."[156] Likewise, the District of Nebraska used to explicitly bind itself to the Nebraska state rules and appears to still follow them.[157] Although the local rules of the District of North Dakota, the District of South Dakota, and the Western District of Wisconsin do not share this same history, an inquiry into the districts' practices shows a reliance on the home-state ethics code.[158] There are several factors that promote this convergence at both the state and federal levels. Over the past few decades, the legal profession has had an "increasing[ly] national character" in which disparate rules raise the transaction costs of multistate practice and multistate transactions.[159] Additionally, the bar might worry about conflicting state rules negatively impacting clients' view of lawyers' trustworthiness.[160] And, as described in explaining the interaction of *Brady v. United States*[161] on Model Rule 3.8(d), federal decisions may already be forcing some uniformity or, at minimum, creating tensions with state rules.[162] Thus, there has been a concomitant pressure to adopt a national code of ethics.[163]

Further contributing to this uniformity, most lawyers and judges likely have been habituated to viewing the Model Rules as the definitive word on professional conduct. For decades, the only class that law schools must offer to qualify for accreditation under the ABA guidelines is a course on legal

155. *Compare* W.D. MICH. LOC. CIV. R. 83.1(j) (2018), *with* W.D. MICH. LOC. GEN. R. 1–4, *and* W.D. MICH. LOC. CIV. R. 1–83.

156. *See* Burns v. Schroeder, No. 21-cv-192, 2021 WL 4427058, at *2 n.1 (W.D. Mich. Sept. 27, 2021) (citing W.D. MICH. LOC. CIV. R. 83.1(j)).

157. *Compare* D. NEB. LOC. R. 83.5(d)(2) (2002), *with* D. NEB. GEN. R. 1.7(b)(2) (2023). S*ee, e.g.*, Neb. Data Ctrs., LLC v. Khayet, No. 8:17CV369, 2018 WL 2050567, at *2–3 (D. Neb. Apr. 24, 2018) (applying Nebraska rules to motion to disqualify).

158. There are three cases in which the U.S. District Court for the District of North Dakota directly decided professional-conduct issues and used the term "professional conduct." In each of these three cases, the courts noted their general reliance on the home-state rules. *See* Shields v. Wilkinson, No. 12-cv-160, 2013 WL 12086264, at *2 (D.N.D. Sept. 11, 2013); Halligan v. Blue Cross & Blue Shield of N.D., No. CIV. A3-93-117, 1994 WL 497618, at *1 (D.N.D. Jan. 24, 1994); United States v. Luger, No. 13-cr-92, 2015 WL 13101978, at *2 (D.N.D.), *order vacated on reconsideration*, No. 1:13-cr-92, 2015 WL 13101979 (D.N.D. May 14, 2015), *aff'd*, 837 F.3d 870 (8th Cir. 2016). Similarly, cases from Wisconsin and South Dakota point to their home-state rules. *See, e.g.*, Olson v. Sauk Cnty., No. 22-CV-562, 2024 WL 3273357, at *4 (W.D. Wis. July 2, 2024) ("In considering a motion for disqualification, this court looks to the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys."); Buergofol GMBH v. Omega Liner Co., Inc., 653 F. Supp. 3d 658, 662–63 (D.S.D. 2023) ("[O]n-point cases from the jurisdiction in which the ethics rule applies, along with the rule itself, are the relevant authority.").

159. *See* Coquillette & McMorrow, *supra* note 132, at 124.

160. *See* Zacharias, *supra* note 32, at 345.

161. 397 U.S. 742 (1970); *see supra* notes 139–41 and accompanying text.

162. *See* Zacharias, *supra* note 32, at 345.

163. *See* Coquillette & McMorrow, *supra* note 132, at 124.

ethics.[164] Most of these classes are organized around the Model Rules.[165] Additionally, nearly all of these lawyers will have had to pass the Multistate Professional Responsibility Exam, which primarily tests the Model Rules.[166] The Model Rules have become part of the underlying norms within the legal profession such that they guide attorney conduct and judicial decisions even though the Model Rules explicitly disclaim such a broad application.[167] Illustrating this gravitational pull, a commentator identified inconsistencies with the Model Rules as a key mistake that led to the rejection of proposed Texas professional-conduct rules.[168]

Model Rule 1.16(b) and the state variations illustrate the limited divergence for many important professional-conduct rules. Model Rule 1.16(b) allows a lawyer to withdraw from a representation when continuing would result in an unreasonable financial burden.[169] Every U.S. jurisdiction uses the exact language of Model Rule 1.16(b), or a close variation, other than California and New York, which omit it altogether from the ethical bases for withdrawing from representation.[170]

Moreover, in a federal system, states are meant to be labs of innovation that respond to local issues in their system-design choices.[171] Therefore, some true substantive variation is to be expected and even desired as the local experiments can feed into national reforms.[172] The lack of perfect uniformity across states also derives from the relatively frequent pace of amendments to the Model Rules—small, piecemeal changes to the Model Rules are adopted by states in especially uneven and unpredictable paces.[173] But, again, such variations are presumably responsive to local conditions and rarely will result in significant differences across the states.

164. *See* AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024, at 18 (2023).

165. *See* John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 55 (2013).

166. *See id.*

167. *See id.* at 55–56; Coquillette & McMorrow, *supra* note 132, at 124–25.

168. *See* Charles Herring, Jr., *Lessons from the Debacle: How Not to Write Rules or Run a Referendum*, 55 ADVOCATE 8, 10 (2011).

169. *See* MODEL RULES OF PRO. CONDUCT r. 1.16(b) (AM. BAR ASS'N 2024).

170. *See* AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-16.pdf [https://perma.cc/R6RR-U4KH].

171. *See* H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 125 (1997).

172. *See id.*; *see also* Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A. L. REV. 213, 219 (1981).

173. *See* Dzienkowski, *supra* note 165, at 65; Andrews, *supra* note 150, at 1450–51.

C. Ethics Rules as Positive Procedural Law

A frequent refrain is that state professional-conduct rules do not bind federal courts.[174] After all, the Supreme Court plainly said, "The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts."[175] But this leaves out an important part of the story—the ability of district courts to self bind to state rules.

Illustrating this common mistake, in the General Motors MDL, a district court rejected an argument that turned on the noncompliance of the attorneys with the Texas Disciplinary Rules of Professional Conduct.[176] The court asserted, "The Texas Disciplinary Rules of Professional Conduct are obviously not binding on this Court."[177] Although this statement was technically correct, it misstated the underlying substantive law.

The Supreme Court has noted that "[a] district court has discretion to adopt local rules."[178] Accordingly, although the Texas rules did not apply in the General Motors MDL, local rules, via Rule 83 and the Rules Enabling Act, are still binding positive law.[179] The combination of Rule 83 (granting district courts the power to adopt local rules) and Rule 1.5(b)(5) of the Local Rules of the U.S. District Courts for the Southern and Eastern Districts of New York (adopting the New York Rules of Professional Conduct) means that the Southern District of New York has bound itself to the New York Rules of Professional Conduct, which contain a substantively similar proposition to that in the Texas Rules.[180] In fact, all but five district courts have formally adopted professional-conduct rules through their local rulemaking process.[181] Of these, all but one district court have chosen to self bind to their home state rules (seventy-two districts),[182] the ABA Model

174. *See, e.g.*, *In re* Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170, 179 n.2 (S.D.N.Y. 2020).

175. *In re* Snyder, 472 U.S. 634, 645 n.6 (1985).

176. *See In re Gen. Motors*, 477 F. Supp. 3d at 179 n.2.

177. *Id.*

178. *See* Hollingsworth v. Perry, 558 U.S. 183, 191 (2010) (per curiam) (citing Frazier v. Heebe, 482 U.S. 641, 645 (1987)).

179. *See id.* (citing Weil v. Neary, 278 U.S. 160, 169 (1929)); *see, e.g.*, Rekor Sys., Inc. v. Loughlin, No. 19-cv-7767, 2021 WL 2186439, at *2 (S.D.N.Y. May 28, 2021); Woods Constr. Co. v. Atlas Chem. Indus., Inc., 337 F.2d 888, 890 (10th Cir. 1964); Jackson v. Beard, 828 F.2d 1077, 1078 (4th Cir. 1987); *see also* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1320 n.155 (2010); Adam N. Steinman, *What Is the Erie Doctrine?: (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 251 (2008). *See generally Positive Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Positive law typically consists of enacted law — the codes, statutes, and regulations that are applied and enforced in the courts.").

180. *Compare* N.Y. RULES OF PRO. CONDUCT r. 1.5(G), *with* TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.04(f).

181. *See supra* note 153.

182. S.D. ALA. GEN. L.R. 83.3(i); D. ALASKA CIV. L.R. 83.1(h); D. ARIZ. LOC .R. CIV. 83.2(e); E.D. ARK. L.R. app. at IV(B); W.D. ARK. L.R. app. at IV(B); N.D. CAL. CIV. LOC. R. 11-4(a); D. COLO. LOC. ATT'Y R. 2(a); D. CONN. CIV. LOC. R. 83.2(a); D.D.C. LOC. CIV. R. 83.15(a); N.D. FLA. GEN. LOC. R. 11.1(G)(1); M.D. FLA. LOC. R. 2.01(e); S.D. FLA. LOC. R. 11.1(c); N.D. GA. CIV. LOC. R. 83.1(C); D. HAW. GEN & CIV. LOC. R. 83.3; D. IDAHO LOC.

Rules (four districts),[183] or some combination thereof (twelve districts).[184] And, as noted above, even the six outlier districts rely on the home-state rules and/or ABA rules in actual practice.[185]

Further supporting the legal weight of these local rules, whether enacted by a legislature[186] or high court,[187] the underlying state professional-conduct rules are independent positive law too.[188] Moreover, the ABA Model Rules themselves (which are adopted by some district courts and are a model for virtually all of the other district courts that have adopted professional-conduct rules) were drafted to look more like ordinary law and drew from prior laws regulating attorney conduct.[189]

CIV. R. 83.5(a); C.D. ILL. LOC. CIV. R. 83.6(E); S.D. ILL. LOC. R. 83.2(a)(2); N.D. IND. CIV. LOC. R. 83-5(e); S.D. IND. LOC. R. 83-5(f); N.D. IOWA CIV. LOC. R. 83(f)(1); S.D. IOWA CIV. LOC. R. 83(f)(1); D. KAN. R. PRAC. 83.6.1(a); E.D. KY. LOC. R. CIV. PRAC. 83.3(c); W.D. KY. L.R. CIV. PRAC. 83.3(c); E.D. LA. LOC. CIV. R. 83.2.3; M.D. LA. LOC. CIV. R. 83(b)(6); W.D. LA. LOC. CIV. R. 83.2.4; D. ME. CIV. LOC. R. 83.3(e)(1); D. MD. LOC. R. 704; D. MASS. LOC. R. 83.6.1(a); E.D. MICH. CIV. LOC. R. 83.22(b); D. MINN. LOC. R. 83.6(a); N.D. MISS. LOC. UNIF. CIV. R. 83.5; S.D. MISS. LOC. UNIF. CIV. R. 83.5; E.D. MO. LOC. R. 12.02; W.D. MO. LOC. R. 83.6(c)(1); D. NEV. LOC. R. PRAC. IA 11-7(a); D.N.H. LOC. R. 83.5 DR-1; D.N.J. LOC. CIV. R. 103.1(a); D.N.M. LOC. R. CIV. 83.9; E.D.N.Y. LOC. CIV. R. 1.5(b)(5); N.D.N.Y. LOC. R. PRAC. 83.3(d); S.D.N.Y. LOC. CIV. R. 1.5(b)(5); W.D.N.Y. LOC. R. CIV. PROC. 83.3(a); E.D.N.C. LOC. CIV. R. 83.1(i); M.D.N.C. LOC. R. CIV. PRAC. 83.10e(b); W.D.N.C. LOC. CIV. R. 83.2(a); N.D. OHIO LOC. CIV. R. 83.7(a); S.D. OHIO LOC. CIV. R. app. at IV(B); E.D. OKLA. LOC. CIV. R. 83.6(b); N.D. OKLA. LOC. GEN. R. 3-2; W.D. OKLA. LOC. CIV. R. 83.6(b); D. OR. LOC. R. CIV. PROC. 83-7(a); E.D. PA. LOC. R. CIV. PROC. 83.6(IV)(B); M.D. PA. LOC. R. 83.23.2; W.D. PA. LOC. CIV. R. 83.3(A)(2); D.R.I. LOC. R. 208; D.S.C. LOC. CIV. R. 83.I.08(IV)(B); E.D. TENN. LOC. R. 83.6; M.D. TENN. LOC. CIV. R. 83.01(c)(6); W.D. TENN. LOC. R. CIV. 83.4(h); E.D. TEX. LOC. R. 2(a); N.D. TEX. LOC. CIV. R. 83.8(e); S.D. TEX. LOC. R. app. A at 1; D. UTAH LOC. CIV. R. 83-1.1(d)(1); D. VT. ATT'Y DISCIPLINARY R. 2(a); E.D. VA. LOC. CIV. R. 83.1(J); E.D. VA. LOC. CIV. R. app. B at IV(B); W.D. VA. LOC. R. 6(h); Standing Order on Local Rule IV(B) Federal Rules of Disciplinary Enforcement in the United States District Court for the Western District of Virginia (Nov. 6, 1998), https://www.vawd.uscourts.gov/sites/Public/assets/File/StandingOrders/Attorneys/disciplinaryamended.pdf [https://perma.cc/BUJ8-WV92]; E.D. WASH. LOC. CIV. R. 83.3(a); W.D. WASH. LOC. CIV. R. 83.3(a)(2); E.D. WIS. GEN. LOC. R. 83(d)(1); D. WYO. LOC. CIV. R. 84.1(a).

183. D. DEL. LOC. R. CIV. PRAC. & PROC. 83.6(d); D. N. MAR. I. LOC. R. 1.5; D.P.R. LOC. R. 83E(a); D.V.I. CIV. LOC. CIV. R. 83.2(a)(1).

184. N.D. ALA. LOC. R. 83.1(f); M.D. ALA. LOC. R. 83.1(g); C.D. CAL. LOC. CIV. R. 83-3.1.2; E.D. CAL. LOC. R. 180(e); M.D. GA. LOC. R. 83.2.1(A); S.D. GA. LOC. CIV. R. Proc. 83.5(d); D. GUAM GEN. R. 22.3(b); N.D. ILL. LOC. R. 83.50; D. MONT. LOC. CIV. R. 83.2(a); W.D. TEX. LOC. ATT'Y R. 7(a); N.D. W. VA. LOC. R. GEN. PRAC. AND PROC. 84.01; S.D. W. VA. LOC. R. CIV. PROC. 83.7.

185. *See supra* Part II.B.

186. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6000-6243 (Deering 2024).

187. *See, e.g.*, WASH. GEN. R. 9.

188. *See* Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 905 (1995); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 12 (1990).

189. *See* Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 42–44 (1998); Benjamin P. Cooper, *Taking Rules Seriously: The Rise of Lawyer Rules as Substantive Law and the Public Policy Exception in Contract Law*, 35 CARDOZO L. REV. 267, 297 (2013) (citing, among others, Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241–42 (1991) and Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 225–27, nn.7–10 (1993)).

D. Professional-Conduct Rules in MDLs

Although district courts frequently ignore professional-conduct rules or disclaim their authority, ethics rules nevertheless appear in procedural decisions, including in MDLs. On one hand, with a multitude of lawyers participating in MDLs, it is no surprise that the professional-conduct rules show up a lot too. To this, many of the rules' appearances are related to ordinary professional-conduct issues that have only, at most, an incidental link to the litigation falling under § 1407 as, for example, when local counsel moves to withdraw after the out-of-state primary counsel has withdrawn.[190] Other cases are more related, such as when a lawyer was disqualified due to personal conflicts of interest after filing for personal bankruptcy where the lawyer's debts included fees to expert witnesses and his only financial prospects were related to settling the MDL claims of his clients.[191] But the professional-conduct rules also show up where there are issues specifically related to the management of the MDL and the lack of any MDL-specific procedural authority.

A broad invocation of professional responsibility norms has been used ex ante to justify selected procedures as, for example, with the supervision of attorneys' fees in several groundbreaking MDLs.[192] Additionally, the professional-conduct rules have been used ex post (with highly variable degrees of analytic rigor) when motions raise them to challenge the transferee court's actions.[193]

Even when judges use their inherent authority in crafting or applying ad hoc procedures such as common-benefit fees, they must anchor their decisions to some generally accepted prescriptive structure.[194] Following from this, several influential MDL orders broadly invoked legal ethics to help craft ad hoc procedures that filled in procedural gaps in MDLs. For example, in *In re Zyprexa Products Liability Litigation*,[195] the district court relied on its "supervisory power to ensure that fees are in conformance with codes of ethics and professional responsibility" to support its capping of the plaintiff

190. *See* Griffin v. Wright Med. Tech., Inc., No. 18-1959, 2019 WL 5102677, at *1–2 (D. Md. Oct. 11, 2019).

191. *See In re* Ski Train Fire in Kaprun Austria on Nov. 11, 2000, MDL No. 1428, 2007 WL 2398697, at *1–5 (S.D.N.Y. Aug. 16, 2007).

192. *See In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 560 (E.D. La. 2009); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) ("Further, this Court has the inherent right and responsibility to supervise the members of its bar in both individual and mass actions, including the right to review contingency fee contracts for fairness."), *amended in part*, MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006) ("A federal court may exercise its supervisory power to ensure that fees are in conformance with codes of ethics and professional responsibility even when a party has not challenged the validity of the fee contract.").

193. *See, e.g.*, Whitehead v. Stull, Stull & Brody, No. 17-4704, 2019 WL 1055756, at *1 (D.N.J. Mar. 5, 2019).

194. Burch, *supra* note 4, at 113.

195. 424 F. Supp. 2d 488 (E.D.N.Y. 2006).

attorneys' contingency fees.[196] Similarly, in *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*,[197] the district court asserted that capping contingency fees was "within the court's inherent power of supervision over the bar to examine the attorney's fee for conformance with the reasonable standard of the Code of Ethics."[198] Following suit, the court in *In re Vioxx Products Liability Litigation*,[199] referenced the Model Rules.[200] But none of these courts actually then applied the framework with reference to specific rules.[201]

Another way that professional-conduct rules influence district courts' creation of ad hoc procedures to fill procedural gaps in MDLs comes from their use of experts. For example, in the World Trade Center cases, Judge Alvin K. Hellerstein appointed an independent ethics counsel to oversee the plaintiffs' counsel.[202] In both the Vioxx and NuvaRing MDLs, law professors provided input into the fee arrangements.[203]

Additionally, professional-conduct rules are implicitly referenced when MDL ad hoc procedures reference compliance with local rules. For example, as part of standing orders permitting plaintiffs' lawyers to appear pro hac vice, courts typically require such counsel to agree to be bound by the local rules, which almost all integrate either the home-state or ABA rules.[204] Some MDL websites also prominently feature the local rules.[205] Still other procedural decisions explicitly reject the local rules' application in MDLs—albeit without any indication under what authority they do so.[206]

Disputes over MDL procedures also result in references to rules of professional conduct. Frequently, district courts blanketly (and wrongly)

196. *Id.* at 492.

197. MDL No. 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008).

198. *Id.* at *5.

199. 650 F. Supp. 2d 549 (E.D. La. 2009).

200. *Id.* at 559.

201. Burch, *supra* note 4, at 113; Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 77–78 (2013).

202. *See* Richard Zitrin, *Regulating the Behavior of Lawyers in Mass Individual Representations: A Call for Reform*, 3 ST. MARY'S J. ON LEGAL MAL. & ETHICS 86, 106–07 (2013).

203. *See* 1 PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 14:23.50, Westlaw (database updated June 2024).

204. *See id.* § 3:13 (citing Order Concerning Direct Filing of Cases, No. 15-md-02657 (D. Mass. Dec. 17, 2015)).

205. *See, e.g.*, *MDL-1355 Propulsid Product Liability Litigation*, E.D. LA., https://www.laed.uscourts.gov/case-information/mdl-mass-class-action/propulsid [https://perma.cc/5JZQ-X5JG] (last visited Aug. 31, 2024); *MDL Cases*, D. MINN., https://www.mnd.uscourts.gov/mdl-cases [https://perma.cc/PC9P-Z4J3] (last visited Aug. 31, 2024).

206. *See, e.g.*, *In re* Norplant Contraceptive Prods. Liab. Litig., MDL No. 1038, 1995 WL 116134, at *3 (E.D. Tex. Feb. 22, 1995); Sheila L. Birnbaum, *Mass Torts*, *in* 12 BUS. & COM. LITIG. FED. CTS. § 128:26, Westlaw (database updated Nov. 2022) ("The provisions of this Order, and any subsequent pretrial order or case management order issued in the MDL proceedings, shall supersede any inconsistent provisions of the Local Rules for the United States District Court . . . .").

disclaim the applicability of state rules.[207] By contrast, district courts, on occasion, engage deeply with the applicable professional-conduct rules. In *Whitehead v. Stull, Stull & Brody*,[208] the U.S. District Court for the District of New Jersey analyzed a breach-of-contract action arising out of a dispute over referral fees related to the Vioxx MDL.[209] Specifically, the plaintiffs claimed they were owed 28 percent of the defendants' thirty-one million dollar fee award under a referral fee arrangement.[210] The district court rejected the claim, first explaining that its local rules integrated the home-state professional-conduct rules, which generally prohibited fee splitting with two exceptions.[211] The district court then analyzed the home-state rule on fee splitting and applied it to the specific facts of the case before it.[212]

Even when courts do not raise the rules of professional conduct when crafting or adjudicating disputes over the ad hoc procedures they adopt in MDLs, law professors do.[213] For example, Professors Nancy J. Moore, Lynn A. Baker, and Stephen J. Herman have analyzed the ethics of aggregate settlements, delving into the specific Model Rules and their application.[214]

III. BENEFITS & CAVEATS

When it comes to civil procedure, there is an unavoidable question: "Compared to what?"[215] In a world of scarcity, there will always be practical and normative tradeoffs when selecting one procedure or another and, thus, a predicate to any analysis is understanding the baseline against which any rule or proposal is to be compared. Part III's discussion applies to any application of broad discretion or innovation within civil procedure but it returns occasionally to MDLs because of its high salience and relevance. The comparative questions have particular bite when considering MDLs because "debates over the relative costs and benefits of aggregation proceed with the

207. *See, e.g.*, *In re* Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170, 179 (S.D.N.Y. 2020).

208. No. 17-4704, 2019 WL 1055756 (D.N.J. Mar. 5, 2019).

209. *Id.* at *1.

210. *Id.* at *7.

211. *Id.* at *7–8.

212. *Id.* at *6–9.

213. *See, e.g.*, Silver & Miller, *supra* note 19; Erichson & Zipursky, *supra* note 30; Baker, *Mass Torts*, *supra* note 30.

214. *See* Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233 (2013); Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 483 (2020).

215. *See* Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309, 320 (2022). *See generally* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 631 (2011); Coffee, Jr., *supra* note 93, at 1347 ("Easy as it is to point out that mass tort litigation involves high transaction costs, one must move on to the inevitable next question: 'compared to what?'").

background understanding that the gold standard of participation—an individual trial or even a 'day in court'—is inevitably infeasible."[216]

In MDLs, with individual cases' pretrial management formally taken off the table by § 1407 and formal adjudication on the merits a virtual impossibility,[217] professional-conduct rules might be the next-best thing to anchor what otherwise might look like the district courts' unfettered discretion in crafting ad hoc procedures. And, although district courts have referenced professional-conduct rules in MDL orders, there has not been much inquiry into the relative benefits and costs of systemically applying them to address the "compared to what" issue.[218] This Article undertakes this sort of holistic analysis below with the hope that the exercise will prove useful as the U.S. Judicial Conference's Advisory Committee on Civil Rules (the "Advisory Committee") moves forward with its proposed Rule 16.1 and MDL courts inevitably continue to use ad hoc procedures to manage coordination issues.[219]

This part identifies three characteristics of professional-conduct rules that make them appropriate guardrails to ad hoc procedure in federal civil litigation. First, the substance is a good fit. As noted above, there is significant substantive overlap between the subject areas. And, when considering institutional competencies and system design, professional-conduct rules explicitly acknowledge and wrestle with important normative tradeoffs that are implicit in any exercise of procedural discretion. The substance is also flexible and should have administrability advantages. Second, professional-conduct rules are a source of positive law. Following from this, as contrasted with ad hoc procedure, they limit individual judicial caprice. They also are reasonably uniform, transparent, and predictable. And, as a formal source of law, they should make course corrections easier, whether it is by leading to decisions more amenable to appellate review or to changes in the underlying law if it proves unworkable. Third, professional-conduct rules are adopted after deliberation. The deliberative processes contribute to their legitimacy in several ways, including enhanced democratic participation, added information, and a check against "1 percent procedure."

This part then explores the costs of using professional-conduct rules. Specifically, it identifies (1) the need for an individualized assessment with many professional-conduct rules that cut against their use in aggregate litigation where many of the thorniest procedural-gap issues can be found,

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216. Bradt et al., *supra* note 215, at 320.

217. *See* Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014) (citing *In re* U.S. Lines, Inc., No. 97 CIV. 6727, 1998 WL 382023, at *7 (S.D.N.Y. July 9, 1998) (noting parties' description of experience as being caught in "a black hole"); Fallon et al., *supra* note 10, at 2330; Hon. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIGATION, Summer/Fall 2012, at 26, 31; Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 126 (2013); *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 n.9 (D.C. Cir. 1987)).

218. *See supra* Part II.D.

219. Bradt et al., *supra* note 215, at 321.

(2) the lassitude with which courts treat their own local rules, (3) the imperfect drafting process for both professional-conduct and local rules, (4) professional responsibility's extreme solicitude for the judiciary, (5) federal judges' reluctance to deal with professional-conduct issues, and (6) federalism concerns.

A. Substance

Using professional-conduct rules as procedural gap-filler only makes sense if those rules are substantively relevant. The general conceptual and substantive overlap between professional responsibility and civil procedure has already been covered. Even so, MDLs alone—as a subset of civil procedure and the area in which this Article's case study on common-benefit fees resides—present a wide variety of management issues. This Article's proposal is not so ambitious to think that every complexity will find a solution in the professional-conduct rules. But, as illustrated in Part IV, some of the biggest practical concerns—including the bringing of nonmeritorious claims and fees—are substantively addressed by professional-conduct rules that could supplement existing national procedural rules to lessen the need for—or, at least, anchor the use of—ad hoc procedure. So, although the professional-conduct rules might not work in every case, they should not be ignored when they do.

Moreover, an aggressive understanding of the professional-conduct rules actually would suggest that they apply to every judicial discretion and procedural innovation involving complex practical or normative tradeoffs that are not formally addressed by a specific rule.[220] In such cases, courts presumably are guided by Rule 1,[221] which directs both courts and parties to apply the rules to balance justice and efficiency.[222] But nothing in Rule 1 tells courts how to strike that balance.[223] By contrast, the Preamble to the ABA Model Rules of Professional Conduct explicitly acknowledges that lawyers have many roles and that the thorniest problems frequently arise when there are inexorable normative tradeoffs.[224] And the ethics rules often incorporate these tradeoffs into their provisions.[225] Thus, they could give form to Rule 1's interpretative command.

Another substance-related benefit of district courts' professional-conduct rules is that they are flexible, which should make them an especially good fit for filling procedural gaps that were left unfilled precisely to enhance the discretion of the court (as is the case with MDLs). The flexibility comes

220. *See, e.g.*, Engstrom, *supra* note 4, at 71.
221. *See* Bone, *supra* note 2, at 288.
222. *See* FED. R. CIV. P. 1.
223. *See* Bone, *supra* note 2, at 288.
224. *See* MODEL RULES OF PRO. CONDUCT Preamble ¶¶ 1, 9 (AM. BAR ASS'N 2024).
225. *See, e.g.*, Ted Schneyer, *Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging "Public" over Professional Values*, 70 FORDHAM L. REV. 1831, 1840 n.55 (2002) (discussing the tradeoffs in Model Rule 1.6); Rhode, *supra* note 5, at 114; Hyman & Silver, *supra* note 5, at 973–78. *But see* Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425, 435 (2011).

from two aspects of the existing rules: (1) adoption under Rule 83 permits relatively easy amendment and (2) their generally permissive standards permit case-by-case balancing.

By adopting professional-conduct rules under Rule 83, district courts preserve the ability to quickly amend them. The Rule 83 process is longer than an individual court's crafting of case-specific ad hoc procedures, which require no advance approval from any entity other than the court itself.[226] But local-rule changes are still much faster than national rulemaking, which requires proposed amendments to "undergo[] at least seven stages of formal comment and review, in a process involving five separate institutions."[227]

Additionally, the ABA Model Rules—which provide the basic blueprint for virtually all the state rules and, thus, are relevant to eighty-eight of the district courts' professional-conduct rules[228]—are usually standards that permit nuanced balancing rather than rigid rules. The Model Rules are more statute-like than its predecessor, the Model Code.[229] But they were not a full turn away from flexibility. For example, the Model Code only permitted attorneys to act as an advocate at trial where they were likely to be called as a witness if they could demonstrate that "refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."[230] By contrast, the Model Rules do not require a showing of unique value to the client, making it easier to satisfy and allowing more room to balance the interests of the parties and the court.[231] More generally, as set forth in the Preamble, the Model Rules are explicitly designed to be rules of reason, which are not meant to be mechanically applied if the results would be perverse.[232] Moreover, the hallmark of the Model Rules is the consistent use of the permissive "shall" and multifactor balancing tests.

The Model Rules' flexibility might very well have been a significant factor for many courts in their selection of professional-conduct rules. For example, one judge in the U.S. District Court for the District of Columbia explicitly noted, "When the point of decision was reached as to the adoption of disciplinary rules, the court chose the ABA's model rules (with certain

226. *See* FED. R. CIV. P. 83(a)(1) (requiring public notice and comment).

227. *See* Macfarlane, *supra* note 31, at 133–35 (describing process and quoting Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1110 (2002)); *see also* Adam N. Steinman, *The End of an Era?: Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 45–46 (2016); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1562–68, 1580–82 (2014).

228. *See supra* notes 182–84.

229. *See* Munneke & Davis, *supra* note 189, at 42–44.

230. MODEL CODE OF PRO. RESP. DR 5-101(B)(4) (AM. BAR ASS'N 1980).

231. MODEL RULES OF PRO. CONDUCT r. 3.7(a)(3) (AM. BAR ASS'N 2024); *see also* Brian M. Altman & Jordan M. Smith, *Utilizing the Substantial Hardship Exception to Model Rule 3.7*, 15 GEO. J. LEGAL ETHICS 619, 620–21 (2002).

232. *See* MODEL RULES OF PRO. CONDUCT Preamble ¶ 20 (AM. BAR ASS'N 2024).

modifications thereof), which have provided both thorough guidance and a desired flexibility."[233]

Another substance-related benefit of professional-conduct rules as procedural gap-filler is that, by placing responsibility on the lawyers themselves, they should lessen the courts' administrative burden. Many professional-conduct rules apply to lawyers on both sides. For example, Model Rule 5.6(b) forbids either the acceptance or offering of a settlement agreement that restricts future practice.[234] Additionally, every jurisdiction has adopted the substance of Model Rule 8.4(a), which, in relevant part, makes it misconduct to induce or assist another in a rules violation.[235] All of this is consistent with Rule 1's call for all the institutional actors to work towards procedural goals.[236] Moreover, ex post sanctions and other court enforcement of procedural rules are likely to be less effective than a culture shift around legal practice discouraging the problems in the first place.[237]

B. Positive Law

One advantage flowing from using the professional-conduct rules as procedural gap-filler is that they anchor any innovation to an explicit legal authority that provides some substantively-relevant, knowable, democratically-enacted limits—the hallmark of law. Highlighting the problem with unanchored innovation, the legal authority of MDL transferee courts to approve settlements has been seriously questioned.[238] In that professional-conduct rules address aggregate settlements and attorneys' fees, they provide the answer (at least, some of the time).

More generally, guardrails are a necessary component of law. The FRCP was designed to enhance the discretion of district courts in managing litigation, moving away from the more rigidly structured Code and writs systems that had preceded it.[239] The MDL statute and the proposed Rule 16.1 are even more self-consciously written to provide broad plenary powers to the transferee court.[240] But unfettered discretion appears "*alegal*" if not illegal.[241] And a procedural gap that implies some true need for the

233. Matter of Colson, 412 A.2d 1160, 1172 (D.C. 1979) (Harris, J., dissenting).

234. MODEL RULES OF PRO. CONDUCT r. 5.6(b) (AM. BAR ASS'N 2024); *see also* Baker & Herman, *supra* note 214, at 490–91.

235. *See* AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf [https://perma.cc/X2HA-Q82J].

236. FED. R. CIV. P. 1.

237. *See, e.g.*, Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV. 683, 718 (2017) (describing this with boilerplate objections); *see also* Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 LOY. L.A. L. REV. 395, 396 (1998).

238. *See, e.g.*, Erichson, *supra* note 82, at 1022.

239. *See, e.g.*, Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 473 (2003).

240. *See* Bradt, *supra* note 65, at 840; MARCH 28, 2023 MEETING, *supra* note 86, at 31.

241. *See generally* Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 152; Mullenix, *supra* note 66, at 563; Redish & Karaba, *supra* note 97, at 140.

application of individual discretion, nevertheless, must be subordinate to formally enacted laws.[242]

The strongest case for the transferee courts' procedural innovations in MDLs and other complex litigation is that they are permitted under Rule 16(c)(2)(L), which allows courts to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."[243] But even that Rule must have some limits. In another context in which district courts apply their discretion in setting attorneys' fees, the Supreme Court has cautioned that "in a system of laws[,] discretion is rarely without limits."[244] More recently, the Court further instructed that the limits to discretion are, at minimum, the exercise of judgment guided by "sound legal principles."[245]

Using professional-conduct rules as guardrails to unbounded procedure also provides some protection against individual bias, implicit or otherwise. When an issue is subject to no legal standard, its resolution may ultimately turn on the individual judge's disposition toward the aim of the law or, worse, the party.[246] As fixed, longstanding law, professional-conduct rules provide a baseline against which courts' experiments can be judged.

These same qualities also address endemic concerns about the transparency, predictability, and uniformity of ad hoc procedure.[247] Again, in the context of a controversy over attorneys' fees, the Supreme Court warned that "utterly freewheeling inquiries" may undermine the principle that like cases should be decided the same and that "unconstrained discretion prevents individuals from predicting how fee decisions will turn out."[248] But the professional-conduct rules are fixed.[249] This means they are knowable in advance and more likely to be uniformly applied.[250]

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242. *See generally* Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 19 (2014) ("Parties are subordinate to both the law and judicial authority. But judicial authority is subordinate to the law.").

243. FED. R. CIV. P. 16(c)(2)(L); *see also* Engstrom, *supra* note 4, at 5; Noll, *supra* note 20, at 439.

244. *See* Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 (1989).

245. *See* Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979, 1986 (2016).

246. *See id.*; *see also* Seth Katsuya Endo, *Privilege & Voice in Discovery*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES (Brooke D. Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022); Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-litigation Narrative*, 65 DEPAUL L. REV. 755, 762–64 (2016); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519 (2010); Judge Dana Leigh Marks, *Who, Me?: Am I Guilty of Implicit Bias?*, JUDGES' J., Fall 2015, at 22; Paul Stancil, *Discovery and the Social Benefits of Private Litigation*, 71 VAND. L. REV. 2171, 2196 (2018); Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160 (2012).

247. *See, e.g.*, Heyburn II & McGovern, *supra* note 217, at 26, 32; Gluck, *supra* note 81, at 1689.

248. *See Kirtsaeng*, 136 S. Ct. at 1986.

249. *See* Jordan, *supra* note 29, at 460.

250. *See id.* at 459.

Additionally, the rules are easy to find. In 1995, Professor Daniel R. Coquillette described the difficulties in surveying district courts' local rules, explaining that "the local rules picture changes monthly and it is very difficult for loose leaf services to remain accurate."[251] The picture at the time presumably reflected the legacy of the local rules: for almost the first fifty years of their existence, it was a mostly predigital age and there was no notice-and-comment requirement for passing new local rules. But that same year, Rule 83 was amended to require the number of local rules to conform with a uniform numbering system.[252] Seven years later, Congress passed legislation requiring federal courts to post their local rules on their websites.[253] The Model Rules and state professional-conduct rules are online too. Transparency, predictability, and uniformity all are important values because they speak to due process concerns related to the treatment of parties and their counsel.[254] They also add to the ease of procedural administration and compliance[255] even if many ad hoc management techniques (especially in MDLs) may become so uniformly employed that they become part of the de facto procedural expectations.[256]

Amenability to error correction is another benefit that flows from using professional-conduct rules to fill procedural gaps. Again, having a fixed form with a long history provides more textual and precedential grist for the mills of both district and appellate courts. Thus, even if the particular application of any given professional-conduct rule to a procedural gap might be difficult to appeal (given the assumption that many will be interlocutory orders as, for example, is the case with the appointment of PSCs in MDLs), the underlying substance should be more test(ed/able) than innovations that rely on informal, horizontal learning. Scholarly criticism of Judge Jack B. Weinstein's use of the term "quasi-class" to justify district courts' management of attorneys' fees in MDLs implicitly acknowledges the risks of relying on untested horizontal precedent.[257] Moreover, the general absence of formal law and appellate guidance might ultimately be reducing the institutional capacity of the judiciary along those classic adjudicatory functions.[258]

C. Deliberation in Adoption

Another important characteristic of the federal professional-conduct rules is that they have been subject to deliberation at least once and, in most cases,

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251. McMorrow, *supra* note 32, at 10–11 (citation omitted).

252. *See* FED. R. CIV. P. 83 advisory committee's note to 1995 amendment.

253. E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913–15 (codified as amended at 44 U.S.C § 3501).

254. *See* Resnik, *supra* note 28, at 430–31.

255. *See* Jordan, *supra* note 29, at 426.

256. Avraham & Hubbard, *supra* note 96, at 11.

257. *See* Mullenix, *supra* note 66, at 543. *See generally* Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 154 (2012); Gardner, *supra* note 90, at 1638–70.

258. *See* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 98.

twice. All eighty-nine district courts with professional-conduct rules adopted them pursuant to Rule 83. Rule 83(a)(1) compels district courts to provide public notice and an opportunity for comment.[259] Illustrating the seriousness with which this is taken (at least, occasionally), the Supreme Court invalidated a local rule permitting the streaming of trial video that was adopted by the Northern District of California when the notice-and-comment period lasted only five business days between New Year's Eve and January 8, 2010.[260] The Court contrasted this brief window with the usual practice of administrative agencies, which provide a comment period of thirty days or more.[261] Rule 83 also requires district courts to appoint an advisory committee.[262]

Eighty-eight district courts have professional-conduct rules that have been subject to discussion and debate twice.[263] One deliberative moment is provided under Rule 83(a). But, even earlier, the adopted professional-conduct codes underwent deliberative processes.

First, eighty-four district courts have formally adopted their home-state rules of professional conduct through the local rules.[264] These rules usually are promulgated after providing the public with the opportunity to comment on them. For example, in Washington, the state supreme court publishes proposed rules for public comment in both physical media and on the internet.[265] The Washington Supreme Court also may hold a hearing on the proposed rule too.[266]

Second, four more district courts have adopted the ABA Model Rules.[267] The Model Rules were drafted after an expert commission presented recommendations, and the ABA House of Delegates hotly debated the proposals.[268] Subsequent amendments, especially the major reworkings of the Model Rules, have received the same deliberative treatment.[269] For example, in the late 1990s, the ABA undertook a comprehensive reexamination of the Model Rules, which "took three years, countless drafts, and hundreds of hours of debate and deliberation to produce a 400-page final report suggesting hundreds if not thousands of changes to the ABA Model Rules of Professional Conduct."[270]

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259. FED. R. CIV. P. 83(a)(1); 28 U.S.C. § 2071(b); Scott Dodson, *The Making of the Supreme Court Rules*, 90 GEO. WASH. L. REV. 866, 882 (2022).
260. *See* Hollingsworth v. Perry, 558 U.S. 183, 199 (2010).
261. *Id.* at 192.
262. 28 U.S.C § 2077(b); Dodson, *supra* note 259, at 882.
263. *See supra* notes 182–84.
264. *See supra* notes 182, 184.
265. *See, e.g.*, WASH. GEN. R. 9(g)(1).
266. *See, e.g.*, *id.* 9(h)(1).
267. *See supra* note 183.
268. *See* Andrews, *supra* note 150, at 1446.
269. *See id.* at 1448–50 (describing the ABA's Ethics 2000 project).
270. Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 262 (2003) (quoting Mark Hansen, *The New Rule Models*, 87 A.B.A. J., Jan. 2001, at 50).

Although Rule 83 and the resulting local rules are as "binding as any statute,"[271] they share many characteristics with agency regulations.[272] As Professor Elizabeth G. Porter has explained, through the Rules Enabling Act, "Congress delegated to the Court the power 'to prescribe general rules of practice and procedure' for cases in federal district courts and courts of appeals, subject to congressional acquiescence."[273] Professor Miriam Seifter has delved deeply into the benefits of providing opportunities for public participation and deliberation in administrative law, offering a framework that is adapted below to fit professional-conduct rules as procedural gap-filler.[274]

Rule 83's notice-and-comment requirement and the deliberative processes of the underlying professional-conduct rules allow for those affected by or otherwise interested in the issues to have a voice rather than be ruled by bureaucratic fiat of unelected judges.[275] Accordingly, even if the public does not have a direct vote on the adoption of the district courts' professional-conduct rules, they still have "a structured opportunity to provide input into the decision-making process."[276]

In addition to taking the temperature of the people's will, these deliberative processes may also provide valuable information to the drafters of the rules.[277] Rulemaking bodies that are peopled by experts who likely are demographically and ideologically similar may lack a broad perspective and fall prey to heuristic and confirmation bias.[278] Thus, even judge-made ad hoc procedure likely exhibits characteristics of 1 percent procedure—that is, the tendency of civil procedure to focus on elite types of litigation for the benefit of the most elite players.[279] The input of the public—even if still mostly coming from lawyers—might cut against this occurrence too. This is especially true of the underlying professional-conduct rules, where all lawyers have a strong interest in their creation.[280] MDL ad hoc procedures

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271. Bank of N.S. v. United States, 487 U.S. 250, 255 (1988).

272. *See* Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 125 n.8 (2015); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1208 (2012); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 930 (1999).

273. *See* Porter, *supra* note 272, at 125 n.8 (quoting 28 U.S.C. § 2072(a)).

274. *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1325 (2016).

275. *See* Air Transport Ass'n v. Dep't of Transp., 900 F.2d 369, 375 (D.C. Cir. 1990), *vacated on other grounds*, 498 U.S. 1077 (1991); *see also* Seifter, *supra* note 274, at 1364; Mulligan & Staszewski, *supra* note 272, at 1244.

276. *See* Seifter, *supra* note 274, at 1318 n.88 (quoting Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 L. & CONTEMP. PROBS. 127, 129 (1994)).

277. *See* Pharm. Mfrs. Ass'n v. Kennedy, 471 F. Supp. 1224, 1235 (D. Md. 1979).

278. *See* Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 931 (2020) (citing Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012); Thornburg, *supra* note 246, at 784–90).

279. *See* Coleman, *supra* note 25, at 1050.

280. *Compare* Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 381 (2004), *and* Amy R. Mashburn, *Professionalism as*

like the use of common-benefit fees, by contrast, seem to turn on judges' half-remembered Econ 101 courses and a preoccupation with financial incentives for elite lawyers.[281]

D. Caveats

Professional-conduct rules are not unalloyed goods as procedural guardrails. This part discusses six major issues. First, taking as given that multidistrict litigation is one of the areas with the most procedural gaps, it may be hard to map rules designed for individual lawyer-client relationships to mass adjudication. Second, district courts' local rules may be less lawlike in practice than in theory. Third, the processes for adopting local rules and professional-conduct rules are subject to fair criticism. Fourth, professional responsibility has its own hierarchy that places the judiciary at the top, which might justify departures from the ordinary rules. Fifth, federal courts have been reluctant care tenders of legal ethics. Sixth, the use of professional-conduct rules might look like its own procedural innovation that could raise federalism questions and potentially run afoul of the Rules Enabling Act or the Rules of Decision Act.[282]

Professional-conduct rules tend to assume individual lawyer-client relationships.[283] If these rules require individualized representation (what might be called the moral-philosophy concern of doing right by the specific client), they may simply be inexorably at odds with the procedural issues raised by the crush of complex litigation that is common today (what might be identified as the political-philosophy concern of ensuring that the public has a functioning judiciary),[284] providing far fewer ethics tools to fill the procedural gaps.[285] For example, Professor Morris Ratner has argued that Model Rule 1.5, which prohibits unreasonable attorneys' fees, demands examination of "such context-specific matters as the client's understanding of a lawyer's likely opportunity costs, the work done by the lawyer in a particular case, as well as the specific lawyer's experience and ability," with the evaluations "evaluat[ing] each lawyer-client relationship on its own

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Class Ideology: Civility Codes and Bar Hierarchy, 28 VAL. U. L. REV. 657, 672–73 (1994), *with* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 684–85 (1989), *and* Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 542 (1985).

281. *See In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 953, 968 (N.D. Cal. 2021) (criticizing many courts' seeming "obsession" with free riders in MDLs and characterizing common-benefit compensation as "totally out of control").

282. 28 U.S.C. § 1652; *see* Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1180–81 (2006).

283. *See* Zitrin, *supra* note 202; Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1172 (1995); Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 160 (2015).

284. *See* Erichson, *supra* note 100, at 1828.

285. *See* Ratner, *supra* note 201, at 79; Erichson, *supra* note 100, at 1831.

terms."[286] Professor Ratner then contrasts this with the variety of cases that may be filed within a single MDL where individual claimants might have differing abilities to prove their claims or damages and lawyers' skills will widely vary.[287]

One more limitation to this Article's proposal is that, although district courts' local rules and the professional-conduct rules that they adopt thereof are positive law, they may be less lawlike in practice than in theory.[288] For example, in *Silberstein v. I.R.S.*,[289] the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment even though the movant had not complied with a local rule requiring that all Rule 56 motions (motions for summary judgment) be made by forty-five days before the date set for trial.[290] The Eighth Circuit held that "the district court has considerable leeway in the application of its local rules" and that it was "for the district court to determine what departures from its rules may be overlooked."[291] This dynamic may be especially true for rules that govern attorney conduct given courts' inherent supervisory powers.[292] Moreover, professional-conduct rules, themselves, are subject to the fair critique that they leave significant room for uncertainty in their application.[293]

Additionally, although the processes for adopting local rules and professional-conduct rules are subject to greater structural prophylactics than ad hoc procedures crafted by individual judges, they are not immune to sharp criticism. With local rules, notwithstanding its notice-and-comment requirement, Rule 83 ultimately places the court rulemaking process in the hands of unelected judges who are—by design—structurally insulated from political pressure by virtue of having presumptively lifetime tenure and protection against the diminution of their compensation.[294] The approval process also does not involve the executive branch in any way and only asks for the silent acquiescence of Congress.[295] These same criticisms may be leveled against the Model Rules, which are written entirely by members of the trade, and the state variations that, usually, are adopted by courts.[296]

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286. Ratner, *supra* note 201, at 78–79.
287. *Id.* at 79.
288. *See* Bylin v. Billings, 568 F.3d 1224, 1230 n.7 (10th Cir. 2009).
289. 16 F.3d 858 (8th Cir. 1994).
290. *See id.* at 860.
291. *Id.*; *see also* U.S. Fid. & Guar. Co. v. Lawrenson, 334 F.2d 464, 467 (4th Cir. 1964) ("A court is, of course, the best judge of its own rules.").
292. *See* Bruce A. Green, Doe v. Grievance Committee*: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 531–32 (1989).
293. *See, e.g.*, Baker, *Aggregate Settlements*, *supra* note 30, at 292–93.
294. *See* Mulligan & Staszewski, *supra* note 272, at 1203; *see also* Jordan, *supra* note 29, at 432–33 (contrasting Rule 83(a) with safeguards in 28 U.S.C. §§ 2072–74).
295. *See* Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 839–40 (2004).
296. *See* Moore, *supra* note 188, at 15 (citing Charles Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619 (1978)); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 690–91 (1981).

Yet another issue is professional responsibility's own implicit hierarchy. The Model Rules acknowledges that the most challenging issues are when lawyers face conflicting duties to their clients and the judicial system or public.[297] But the Model Rules mostly resolve these conflicts in favor of the judicial system.[298] For example, under Model Rule 1.6, a lawyer may not reveal information related to the representation of a client unless it falls under one of the listed exceptions.[299] If this rule applies, a lawyer may not disclose a material fact to a third person even when it is necessary to avoid assisting a criminal or fraudulent act by the client.[300] But a lawyer must correct any fraud committed on a tribunal.[301] Accordingly, if one views MDLs as a statutory command to relieve the caseloads pressure on the federal judiciary (or, in an economic framework, the negative externality that the individually filed cases impose on the public fisc), it might be that the client-protective rules should bend. This tension between the individual client and judge is reflected in an earlier empirical study, which showed the judges' own sensitivity to harms to the functioning of the judiciary.[302]

The biggest practical caveat is federal judges' negative experiences and attitudes toward using the rules of professional conduct. As Professor Resnik observed, "The mere existence of rules does not automatically result in their enforcement . . . ."[303] In practice, federal judges often ignore professional-conduct rules, even when they are substantively implicated. For example, courts typically do not fully invalidate lawyer-client fee agreements even when the lawyer unquestionably violated an ethical rule.[304] Federal judges also are even reluctant to sanction lawyers for the professional-conduct violations they observe.[305]

There are any number of possible reasons for this reluctance. Some courts might not see it as their job. As the U.S. Court of Appeals for the Second Circuit stated, "The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it."[306] Others might heed the Model Rules' own caution that its use is limited to bar discipline.[307] Still others might be following the general approach of their colleagues as a

297. *See* MODEL RULES OF PRO. CONDUCT Preamble ¶¶ 1, 9 (AM. BAR ASS'N 2024).

298. *See* John M. Burman, *Lawyers' Duties to Tribunals: Part II - Candor*, WYO. LAW., Dec. 2011, at 46.

299. MODEL RULES OF PRO. CONDUCT r. 1.6.

300. *Id.* r. 4.1(b).

301. *Id.* r. 3.3.

302. McMorrow et al., *supra* note 110, at 1453.

303. Resnik, *supra* note 28, at 433.

304. *See* Alex B. Long, *Attorney-Client Fee Agreements That Offend Public Policy*, 61 S.C. L. REV. 287, 301 (2009). *See generally* Cooper, *supra* note 189, at 269.

305. *See* John M. Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95, 97 (1982) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), as an example).

306. *See* McMorrow et al., *supra* note 110, at 1441 (alteration in original) (quoting W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976)).

307. *See* Johnson, *supra* note 100, at 902.

form of cultural conformity or to avoid questions of partiality.[308] Judges may view the professional-conduct rules as unnecessary either because they are relying on their inherent authority as managers of litigation or there are parallel federal rules.[309] They may even view superintending professional conduct as embarrassing to the lawyers before them and reputation diminishing for the judges themselves.[310] Finally, to the extent that critics are right about professional-conduct rules frequently calling for individualized assessments, judges have a strong vested interest in retaining flexibility, especially with mass torts that may otherwise swamp a judge's docket.[311] As one professor quipped, "If one truth emerges from all the debate and discussion of mass tort class actions it is that judges dread the prospect of spending the remainders of their careers trying, seriatim, factual variations on the same mass tort fact pattern."[312]

Finally, one might question whether this Article's proposal is its own form of procedural innovation that might conflict with either the Rules Enabling Act or the Rules of Decision Act. The Rules Enabling Act prohibits procedural rules that "abridge, enlarge or modify any substantive right."[313] Although professional-conduct rules undeniably affect substantive rights, federal courts occasionally borrow from state substantive law when there is a procedural gap such as when there is no applicable federal statute of limitations.[314] More conceptually, such borrowing is consistent with the modesty that the Rules Enabling Act requires because the federal judiciary is not authoring the substantive provision. The Rules of Decision Act prevents federal courts from displacing state law when applicable unless the Constitution, a U.S. treaty, or a congressional act requires the use of federal law.[315] But, again, the federal courts' borrowing of state professional-conduct rules actively harmonizes the two, avoiding any true Rules of Decision Act conflict.

IV. MDL FEES EXAMPLE

Court supervision of attorneys' fees in MDLs provides an especially helpful case study of professional-conduct rules as procedural gap-filler. As discussed above, MDLs are "a procedural no-man's land"[316] that encourage

308. *See* McMorrow et al., *supra* note 110, at 1439–40; Noah Smith-Drelich, *Curing the Mass Tort Settlement Malaise*, 48 LOY. L.A. L. REV. 1, 47 (2014).

309. *See* Porter, *supra* note 272, at 136–38; Perlman, *supra* note 101, at 1966.

310. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 595 (1998); Leslie W. Abramson, *The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 779–80 (1997).

311. *See* Rubenstein, *supra* note 93, at 426–27; Resnik, *supra* note 93, at 937–38; Coffee, Jr., *supra* note 93, at 1363–64.

312. *See* Henderson, Jr., *supra* note 93, at 1020 n.39.

313. 28 U.S.C. § 2072.

314. *See, e.g.*, DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158–60 (1983).

315. 28 U.S.C. § 1652.

316. Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 95 (2011); *see also* Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 L. & CONTEMP. PROBS. 107, 107 (2021).

judges to innovate without much—if anything—in the way of limits or guidance. But the MDL courts' authority to aggressively manage attorneys' fees is especially weak and underdeveloped. And, in that the problem of common-benefit fees has become higher profile but is not going to be fixed by the proposed Rule 16.1, this Article's intervention is especially timely. Finally, as demonstrated below, the rules of professional conduct squarely address the substantive issues.

Against this backdrop, this Article applies a professional responsibility lens to the management of attorneys' fees in federal MDLs, which leads to three analytic shifts. First, the move redefines the underlying concern animating the courts' policing of fees to the issue of preventing windfalls, a substantively more expansive and coherent concern than the prevailing worries about free riding and unjust enrichment. Second, the rules of professional conduct tether the MDL courts' management of fees to an existing positive-law framework that carries with it all the benefits described at the categorical level in Part III. Third, the move focuses attention on the obligations of the lawyers themselves, which should reduce the burden on courts in several important ways.

A. Basic Background on Common-Benefit Fees in MDLs

This Article's case study of MDL courts' management of attorneys' fees requires a basic understanding of the slender reed upon which common-benefit fees rest. The management of attorneys' fees—especially through the form of common-benefit fees—is particularly contested because the stakes are high and the doctrinal rationales are weak even as courts "regulate fees far more muscularly in MDLs than is customary."[317] To the former, attorneys' fees in MDLs can range from a few thousand dollars to billions of dollars.[318] To the latter, federal courts offer various authorities to support their reallocation of fees between the IRPAs and the PSCs but "each theory standing alone is too sparse and cannot fully explain fee awards."[319] Regarding these bases, a recent decision from the U.S. District Court for the District of Arizona identified the federal MDL statute itself, its inherent judicial power, and the common fund doctrine as implicitly authorizing the use of common-benefit fees.[320]

317. Silver, *supra* note 20, at 1654; *see* Gluck & Burch, *supra* note 4, at 13–14.

318. *See* Andrew J. Trask, *Ten Principles for Legitimizing MDLs*, 44 AM. J. TRIAL ADVOC. 113, 114 (2020) (citing Anderson Law Offices' Objections to Common Benefit Fee Allocation and Reimbursement of Cost Recommendations at 3, *In re* C.R. Bard, Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. 10-md-02187 (S.D. W. Va. Mar. 26, 2019), Dkt. 7928, in which attorneys "challeng[ed] distribution of $344 million common benefit fund and argu[ed] committee members engaged in self-dealing by keeping $143 million for themselves"); *In re* Oral Sodium Phosphate Sol.-Based Prods. Liab. Action, No. MDL 2066, 2010 WL 5058454, at *2–5 (N.D. Ohio Dec. 6, 2010); Gluck & Burch, *supra* note 4, at 13.

319. Burch, *supra* note 4, at 102; *see* Noll, *supra* note 20, at 467; Silver, *supra* note 20, at 1654–55.

320. *See In re* Bard IVC Filters Prods. Liab. Litig., 603 F. Supp. 3d 822, 830 (D. Ariz. 2022). Some courts, apparently, may also reference Rule 23 as a source of authority. *See*

The MDL statute says nothing about allocating common-benefit fees.[321] Nevertheless, many courts have reasoned that without such fees "MDL courts would not only be unable to attract good counsel for leadership roles, they would be unable to attract any counsel" and, thus, "an MDL court's ability to perform the task assigned to it by the MDL statute necessarily requires the power to assure reasonable compensation for the efforts of lead counsel."[322] Courts similarly have suggested that their inherent powers to manage their own affairs to ensure the orderly and expeditious disposition of cases authorizes such fees.[323]

Both of these arguments suffer from several patent flaws. First, unlike many class actions, the lawsuits in MDL cases were filed as independent actions and, thus, presumably were economically viable on their own.[324] Following from this, as described in greater detail below in Part IV.C, any lawyer who took on a case that could foreseeably have been swept into an MDL was obligated to perform any work—including any coordinating tasks—necessary to litigating competently. Additionally, in contrast to the courts' naked assertions about the necessity of incentives, there are instances where lawyers with large inventories of clients have taken on the coordinating tasks without requiring common-benefit fees.[325] Finally, courts' assertions of a power to award common-benefit fees untethered from any other authority raises both Rules Enabling Act and Due Process Clause concerns given the lack of limitations, large substantive economic effects, and displacement of the contractual relationship between the plaintiffs and their lawyers.[326]

The most common rationale for reallocating fees from IRPAs to PSCs is to invoke a variation of the common-fund doctrine that was traditionally limited to class actions.[327] Although the American Rule historically required each litigant to bear their own costs, a longstanding exception is the common-fund or common-benefit doctrine.[328] Putting aside the differences that are not material for this Article's purposes, both doctrines rest on equitable,

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Silver, *supra* note 20, at 1654. But this last basis might only appear when the court is dealing with a certified class too. *See, e.g.*, *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., MDL No. 09-2047, 2018 WL 2095729, at *6 (E.D. La. May 7, 2018).

321. *See* Silver, *supra* note 20, at 1654; Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175, 181 (2019).

322. *In re Bard*, 603 F. Supp. 3d at 831; *see also In re* Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170, 190 (S.D.N.Y. 2020); Smiley v. Sincoff, 958 F.2d 498, 501 (2d Cir. 1992); *In re* Linerboard Antitrust Litig., 292 F. Supp. 2d 644, 653 (E.D. Pa. 2003); *In re* Zyprexa Prods. Liab. Litig., 594 F.3d 113 (2d Cir. 2010).

323. *See, e.g.*, *In re Bard*, 603 F. Supp. 3d at 831–35.

324. *See* Redish & Karaba, *supra* note 97, at 111.

325. *See* Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 442–43 (1998).

326. *See* Burch, *supra* note 4, at 105–06; Redish & Karaba, *supra* note 97, at 144; Robert J. Pushaw & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigation*, 48 BYU L. REV. 1869, 1926 (2023).

327. *See* Burch, *supra* note 4, at 102–04; *In re Bard*, 603 F. Supp. 3d at 838.

328. Fallon, *supra* note 16, at 374–75.

restitution principles that seek to avoid the unjust enrichment of passive, nonclient beneficiaries from the labor of another attorney who has litigated on behalf of those individuals and created a common fund or benefit from which they benefit.[329] The common-fund doctrine migrated from class actions to MDLs as courts conceptualized MDLs as "quasi-class actions" that presented the same litigation dynamics, incentives, and fairness concerns.[330] Even where there was no common fund, PSCs might undertake common discovery or motion practice, deal with MDL-specific tasks such as negotiating fact sheets, and otherwise do work for all the plaintiffs that they would not have to do if they were not in an MDL.[331]

But as Professors Charles M. Silver and Geoffrey Parsons Miller have explained, the common-fund doctrine has several requirements that are clearly not met in MDLs.[332] First, the nonclient beneficiaries might not actually be enriched by the virtual representation because they had, in fact, already retained their own lawyers and chose to go it alone.[333] Second, the inability to opt out of the MDL effectively negates the consent requirement of the common-fund doctrine.[334] Third, individual plaintiffs (and their lawyers) can and do bargain in MDLs, which contravenes another element of the doctrine.[335] Fourth, the individual plaintiffs have their own counsel and are not (voluntarily) passive beneficiaries.[336]

Given the weak legal authorities for MDL courts' "muscular" management of attorneys' fees, something else must be operating. One possibility is, as Professor Brooke D. Coleman has observed, courts and rulemakers often treat pecuniary costs as their normative north star when they are left with procedural discretion.[337] And, as implicitly laid out above, each of the MDL courts' asserted bases for awarding common-benefit fees rests on the underlying principle that it would be unfair to require the PSCs to do uncompensated work that benefits the IRPAs.[338] It is as though the guiding maxim is economist Milton Friedman's phrase, "There ain't no such thing as

329. *See* Burch, *supra* note 4, at 105–06; Fallon, *supra* note 16, at 375.

330. *See* Fallon, *supra* note 16, at 375–76.

331. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 3896006, at *10 (D. Minn. Aug. 21, 2008).

332. Silver & Miller, *supra* note 19, at 121; *see also* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1605–06 (1974).

333. Silver & Miller, *supra* note 19, at 122–24.

334. *Id.* at 124.

335. *Id.* at 124–26.

336. *Id.* at 126–30.

337. *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1790 (2015).

338. *See, e.g.*, *In re* Bard IVC Filters Prods. Liab. Litig., 603 F. Supp. 3d 822, 831 (D. Ariz. 2022) ("And in an MDL like this one, with more than 8,000 cases, the appointment and oversight of lead plaintiffs' counsel is essential. That appointment and oversight necessarily requires the MDL court to address how lead counsel will be paid for their extensive MDL work on behalf of all plaintiffs.").

a free lunch,"[339] without regard for the positive externalities that frequently attend tort litigation.[340]

This impulse probably is buttressed by the convergence of the judges' and PSCs' interests.[341] The courts basically become the clients of the PSCs who help them move the litigation along while the actual plaintiffs bear the costs.[342] Because plaintiffs may not typically pay more than they originally contracted for, they likely have less reason to complain. And any disgruntled IRPA is unlikely to risk the ire of a powerful federal judge by objecting too strenuously.[343] Less cynically, it also is possible that the public's interest in reducing the burdens of mass tort litigation simply outweighs the weak legal justifications for transferring fees between the various plaintiffs' lawyers.[344]

All of this is to say that the realpolitik and practicalities of complex litigation may be leading many courts, lawyers, and academics to assume that MDL courts' aggressive management of attorneys' fees will inexorably continue. But that, in large part, is why this Article was written. Ethics rules are existing legal authorities that cogently address this issue and should not be ignored.

B. Timeliness of Examining Common-Benefit Fees

Several factors counsel for examining common-benefit fees and thinking about alternatives right now. First, a new MDL-specific federal rule of civil procedure might be adopted soon, but it does not address any of the issues related to the courts' management of attorneys' fees. Second, a 2021 opinion brought new attention to the problems of common-benefit fees and has led to increased challenges but, again, no new, easily implementable solutions have been offered (until, perhaps, now with this Article). Third, even MDL judges acknowledge that their management of attorneys' fees is an area in which they would benefit from additional guidance. Fourth, the financial stakes keep growing.

The U.S. Judicial Conference's Advisory Committee on Civil Rules appears likely to adopt a new federal rule of civil procedure for MDLs, making this Article's examination of common-benefit fees particularly timely.[345] A subcommittee of the Advisory Committee began its

339. *See* Hyman & Silver, *supra* note 5, at 971 n.62 (citing William Safire, *Who Coined "There Ain't No Such Thing as a Free Lunch?"*, N.Y. TIMES, Feb. 14, 1993, at 14).

340. *See* Silver & Miller, *supra* note 19, at 121; Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 931 (2015).

341. *See* Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 421 (2011).

342. *See* Henderson, Jr., *supra* note 93, at 1021 n.39.

343. *See* Silver & Miller, *supra* note 19, at 119.

344. *See* Redish & Karaba, *supra* note 97, at 150; Bradt, *supra* note 98, at 1177.

345. *See* MARCH 28, 2023 MEETING, *supra* note 86, at 110; D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEX. L. REV. 1595, 1597 (2023).

consideration of MDLs in 2018.[346] The early report considered how to address meritless claims, interlocutory appellate review, the formation of PSCs and funding, bellwether trials, court-management of settlement, and third-party litigation funding.[347] In 2020, the MDL subcommittee continued to evaluate proposals related to early vetting, interlocutory appeals, and settlement and fees.[348] In 2021, the MDL subcommittee included a "high impact" proposal that it was not inclined to pursue but that would explicitly authorize MDL courts to award common-benefit fees and to modify individual contracts.[349]

The current proposal for Rule 16.1 would offer guidance on procedural tools to address the coordination issues presented by multidistrict litigation, but it would not actually require anything specific of the assigned district court.[350] This absence of a mandatory command is intentional: the Advisory Committee explicitly noted that the "draft rule is designed to maintain flexibility."[351] Accordingly, the natural inference is that the Advisory Committee positively views district courts as having very broad discretion to manage MDLs and to adopt ad hoc procedures for any issues that arise. This procedural pliability makes sense considering the Advisory Committee's observation that MDLs may differ dramatically along critical dimensions, such as the number of cases being consolidated, and evidentiary issues related to the specific substantive law potentially giving rise to liability. With such variation, it is easy to understand the Advisory Committee's reluctance to propose an inflexible one-size-fits-all rule. But that also means, in the absence of more direction, the proposed Rule 16.1 is unlikely to resolve any qualms about existing practices and should not displace any relevant professional-conduct rules that district courts have adopted through their local rulemaking.

As applied to common-benefit fees, the proposed Rule 16.1(c) states that an MDL judge "should" order the parties to meet and confer and to submit a report on any matter that the MDL judge directs with a suggestion that this will include items from Rule 16.1(c)(1)–(12).[352] And Rule 16.1(c)(1)(F) goes to "[w]hether, and if so when, to establish a means for compensating leadership counsel."[353] Additionally, Rule 16.1(d) suggests that the MDL judge "should" issue an initial management order that addresses the issues under Rule 16.1(c), but it does not require the MDL judge to do so.[354] Moreover, neither Rule 16.1(c)(1)(F) nor Rule 16.1(d) provide any direction

346. *See* ADVISORY COMM. ON CIV. RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES APRIL 10, 2018, at 29, https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf [https://perma.cc/5K2Z-C2QH].

347. RHEINGOLD, *supra* note 203, § 3:34.

348. *Id.*

349. *See* OCTOBER 12, 2022 MEETING, *supra* note 86, at 174.

350. *See* MARCH 28, 2023 MEETING, *supra* note 86, at 112–13.

351. *Id.* at 31.

352. *Id.* at 112–13.

353. *Id.* at 112.

354. *Id.* at 113.

on how the MDL judge should (much less "must") substantively address any recommendation on that issue within the report.[355]

Common-benefit fees' profile has risen. In a widely-examined 2021 decision, Judge Vince Chhabria disapproved of many courts' seeming "obsession" with free riders in MDLs and characterized common-benefit compensation as "totally out of control."[356] Although the Advisory Committee expressed its skepticism that it could craft rules to solve the issues raised by Judge Chhabria (and, in fact, the proposed rule does not even try), commentators correctly predicted that the judge's comments would encourage future challenges to common-benefit fees, potentially unsettling almost fifty years of experience.[357]

Even judges recognize that they need more guidance. For example, Judge Weinstein acknowledged, "I believe I gave too little attention to this subject in '*Agent Orange*' and did not fairly compensate the attorneys who represented individuals."[358] More recently, a survey of MDL judges found that they were highly resistant to new MDL-specific procedural rules.[359] But even a few agreed that "a rule on MDL attorneys' fees (and *only* that rule) would be helpful."[360]

The stakes of common-benefit fees also are steadily reaching new heights. In one recent MDL, the lead lawyers requested 3.5 billion dollars in common-benefit fees.[361] Although the sheer financial numbers alone might make them worthy of study, attorneys' fees in MDLs also heighten the risk of providing a windfall[362] due to the lack of structural safeguards.[363]

C. Application of Framework

This Article's framework, as applied to attorneys' fees in MDLs, is straightforward. It begins with the fact that nearly all district courts integrate the rules of professional conduct from their respective home states or the Model Rules, including Model Rule 1.5 and Model Rule 1.16(b), into their

355. *Id.* at 112–13.

356. *See In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 953, 968 (N.D. Cal. 2021).

357. *See* ADVISORY COMM. ON CIV. RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES OCTOBER 5, 2021, at 170 n.11, https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf [https://perma.cc/DY32-RTRL]; Amanda Bronstad, *Could New Rules Rein in 'Totally Out of Control' MDL Fees?*, LAW.COM (Jan. 27, 2022, 11:36 AM), https://www.law.com/thelegalintelligencer/2022/01/27/could-new-rules-rein-in-totally-out-of-control-mdl-fees/ [https://perma.cc/B68P-J67K]; Amanda Bronstad, *Citing 'Gross Overreach,' Hundreds Appeal Opioid Common Benefit Fee Order*, LAW.COM (May 31, 2022, 4:23 PM), https://www.law.com/2022/05/31/citing-gross-overreach-hundreds-appeal-opioid-common-benefit-fee-order/ [https://perma.cc/QRR6-MG3C]; *In re* Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1020 (5th Cir. 1977).

358. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 531–32 (1994).

359. *See* Gluck, *supra* note 81, at 1689.

360. *Id.*

361. Gluck & Burch, *supra* note 4, at 13.

362. *See generally* Rodriquez v. Bowen, 865 F.2d 739, 746 (6th Cir. 1989).

363. *See* Burch, *supra* note 26, at 127–28.

local rules.[364] Model Rule 1.5 and Model Rule 1.16(b) both contain an antiwindfall principle that substantively addresses four issues that commonly arise in awarding attorneys' fees in MDLs.[365] First, the Model Rules should directly control common-benefit fees, usually limiting them because the coordination costs should have been built into the original compensation agreements. Second, the rules establish that, for both the PSC and IRPAs, the surpluses derived from either economies of scale or a "peace" premium, rightly belong to the parties, not the lawyers. As such, the total pool of contracted-for fees (whether redistributed or not) likely constitutes a windfall for the lawyers. Third, the IRPAs are probably also getting undeserved windfalls where they have contracted for a standard percentage but there is no risk of nonrecovery or there is limited work for them to do, or there are clients with nonmeritorious claims who were not properly screened. Fourth, courts have not applied these rules entirely to the lawyers' detriment—they have applied the antiwindfall principle to prevent clients from discharging their lawyers before any recovery but after the lawyers performed substantial work on their behalf, which could support some limited quantum meruit recovery by the PSCs.[366]

Before delving into the specific application of Model Rule 1.5 and Model Rule 1.16(b), it is important to recognize the longstanding judicial understanding that the courts' application of professional-conduct rules to cabin excessive fees usually are "reserved for exceptional circumstances," and "must take into account of the fact that an agreement, if freely made, is not lightly set aside."[367] But neither of these caveats is fatal.

To the first point, outside of cases involving statutory fee shifting, courts usually only actively manage attorneys' fees in exceptional cases where, for example, the clients are especially vulnerable.[368] But, much like how district courts use Rule 16(c)(2)(L) to justify *Lone Pine* orders, stemming from *Lore v. Lone Pine Corp.*,[369] and other MDL ad hoc procedures, it is possible that MDLs using PSCs are categorically exceptional circumstances.[370] There are real risks that the PSCs abuse their position of trust in negotiating both settlement amounts and fees with defendants, which warrants special judicial attention.[371] As one MDL court noted, "It unfortunately appears to be the case that in MDL cases not every individual client gets the full attention of

364. *See* Moore, *supra* note 30, at 2220–21; *see also* AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-5.pdf [https://perma.cc/9X9P-LA7Q]; AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., *supra* note 170.

365. *See* Menkel-Meadow, *supra* note 283, at 1217.

366. *See, e.g.*, Malonis v. Harrington, 816 N.E.2d 115, 120 (Mass. 2004). *See generally* Burch, *supra* note 4, at 128–35; RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 39 (AM. L. INST. 2000).

367. Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 88–89 (1st Cir. 1969).

368. *See* Ratner, *supra* note 201, at 83–84.

369. No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

370. *See* Engstrom, *supra* note 4, at 5; Noll, *supra* note 20, at 439.

371. *See* Burch & Williams, *supra* note 16, at 1490.

their lawyers."[372] Additionally, tasking the court with this sort of supervision is especially appropriate if the rationale for common-benefit fees draws from class-related equitable traditions that usually involve judicial oversight of fees to protect the absent clients.[373]

To the second point, MDL courts could, as a matter of course, simply leave the fee arrangements to the parties without any court-directed common-benefit transfers or other reallocations. This approach was adopted in the L-Tryptophan litigation so it is undeniably within the range of possibilities.[374] And that is where this Article's framework would begin too. Although common-benefit fees are usually conceived as preventing freeriding by IRPAs, PSC members receiving *any* compensation beyond their contracted-for fees could be fairly characterized as an undeserved windfall under the Model Rules and state variations.[375]

Model Rule 1.5 and Model Rule 1.16(b) directly speak to the reasonableness of the economic arrangements between lawyer and client. Model Rule 1.5(a) prohibits unreasonable fees (i.e., a concern that the client might pay too much) and provides a list of considerations that go to that.[376] The primary consideration (it is listed first and tends to be the dominant question for courts) is the time, labor, and skill necessary to competently represent the client.[377] Model Rule 1.16(b) permits withdrawal when continued representation would result in an unreasonable financial burden (i.e., a concern that the client might pay too little).[378] Although Model Rule 1.16(b) and its comment provide no further detail, courts' analyses tend to mirror their approach to Model Rule 1.5, focusing again on the time, labor, and skill required by the representation to determine the range of reasonable compensation.[379] With both Model Rules, the underlying goal is to approximate some notion of fair-market value for the lawyers' services. Consistent with this, in the broader case law on attorneys' fees, one district court has defined "reasonable" attorneys' fees as those that are "adequate to attract competent counsel, but . . . [that do] not produce windfalls to attorneys."[380] Although left undefined, the Supreme Court's use of the term

372. *See In re* Valsartan N-Nitrosodimethylamine (NDMA), Losartan, & Irbesartan Prods. Liab. Litig., No. 19-2875, 2020 WL 955059, at *3 (D.N.J. Feb. 27, 2020); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 533 (2003).

373. *See* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1151–52 (2021).

374. *See* Curtis & Resnik, *supra* note 325, at 442–43.

375. Further, Model Rule 1.5(e) prohibits splitting fees between firms except for certain conditions—such as written client consent—that do not necessarily occur in MDLs. MODEL RULES OF PRO. CONDUCT r. 1.5(e) (AM. BAR ASS'N 2024).

376. *Id.* r. 1.5(a).

377. *Id.*

378. *Id.* r. 1.16(b).

379. *Id.*; *see also* McDaniel v. Daiichi Sankyo, Inc., 343 F. Supp. 3d 427, 432–34 (D.N.J. 2018); Moore, *supra* note 214, at 3273.

380. *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1296, 1303 (E.D.N.Y. 1985) (quoting Blum v. Stenson, 465 U.S. 886, 893–94 (1984)), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987).

"windfall" in *Blum v. Stenson*[381] drew from a Senate report that contrasts "windfall" fees with the going market-rate for the time reasonably spent on the matter.[382]

Model Rule 1.16 implicitly requires lawyers to bear the burden of any unexpected costs of litigation, even in contingency-fee engagements. At first blush, common-benefit fees might seem attenuated from Model Rule 1.16(b)(6)'s language permitting withdrawal if "the representation will result in an unreasonable financial burden on the lawyer."[383] But, in practice, this means that courts evaluate whether the lawyer or the client should bear the burden of uncertainty about the costs of litigating a matter.[384] In these contexts, as acknowledged by section 32 of the Restatement (Third) of the Law Governing Lawyers, courts assume that "lawyers are better suited than clients to foresee and provide for the burdens of representation" and, thus, the "burdens of uncertainty should therefore ordinarily fall on lawyers rather than on clients unless they are attributable to client misconduct."[385] Accordingly, courts are reluctant to let lawyers withdraw from an engagement simply because it "will require more work than the lawyer contemplated when the fee was fixed."[386] In part, section 32 turns on the presumed superior knowledge of the lawyer.[387]

The assumption of the lawyer's superior knowledge is especially salient in the context of MDLs. The reasonableness of contingency fees is assessed from the vantage of what was known at the time of the inception of the engagement.[388] Section 1407 strips away the plaintiffs' decision to proceed alone in the forum of their choice.[389] And it necessarily requires some coordination from all of the parties, which is almost always achieved through the appointment of a PSC.[390] In that MDL lawyers might end up having different roles, one might expect the lawyers to use a weighted average of the costs of possible outcomes, such as being assigned to the PSC, in setting their contingency fee. Regardless of their actual fee practices, if a lawyer agrees to represent a client in a matter that will foreseeably be swept into an MDL (especially if the lawyer plans to put themself forward for appointment to the PSC), the lawyer should be presumed to have structured their fees to take into account the expected value of the coordination costs.[391] Thus, any

381. 465 U.S. 886 (1983).
382. S. REP. NO. 94-1011, at 6 (1976).
383. MODEL RULES OF PRO. CONDUCT r. 1.16(b)(6) (AM. BAR ASS'N 2024).
384. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 32 cmt. m (AM. L. INST. 2000).
385. *Id.*
386. *Id.*; *see also In re* Kiley, 947 N.E.2d 1, 8–9 (Mass. 2011); Haines v. Liggett Group, Inc., 814 F. Supp. 414, 424 (D.N.J. 1993); Kriegsman v. Kriegsman, 375 A.2d 1253, 1256 (Sup. Ct. N.J. App. Div. 1977).
387. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 32 cmt. m.
388. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 00-418 (2000).
389. *See In re* Concrete Pipe, 302 F. Supp. 244, 254 (J.P.M.L. 1969) (Weigel, J., concurring).
390. *See* Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 348–49 (2014); DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 22.62, Westlaw (database updated May 2023).
391. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 32 cmt. m.

additional fee either is an undeserved windfall or implies that the original engagement was taken unethically. Put another way, within the strictures of the professional-conduct rules, no lawyer, whatever other duties they may have to the MDL members as a whole, may escape their duties to the clients whom they have agreed to represent—and, crucially, this is properly understood as including the coordination costs associated with acting as a PSC member.[392]

Section 32 primarily sounds in the economic theory of treating lawyers as the lower-cost avoiders in addressing uncertainty in litigation costs. Although that is sufficiently compelling for many courts, it is but one justification for not letting lawyers receive compensation beyond their fee agreements just because the matter required more work than might have been anticipated. As a Massachusetts court observed, if lawyers were allowed to alter fee agreements at any point in time, it would "undermine[] the 'highly fiduciary' nature of the attorney client relationship and erode[] public confidence in the legal profession by creating the appearance that the attorney client relationship exists to serve the interests of the attorney."[393] Moreover, litigation is often a substitute for government regulation and, thus, lawyers may be serving the public in addition to their own clients when representing victims in mass torts.[394]

Although MDL courts have not embraced this Article's proposed approach in managing attorneys' fees, one MDL court applied the principles described above in denying an attorney's motion to withdraw.[395] In *McDaniel v. Daiichi Sankyo*,[396] several thousand individual plaintiffs sued Daiichi Sanyko, alleging that they had adverse reactions to a family of drugs developed and marketed by the defendants.[397] Terry McDaniel was one of five plaintiffs who refused to participate in a settlement program negotiated by a committee of plaintiffs' counsel.[398] McDaniel's lawyer then moved to withdraw, asserting that it would cost "hundreds of thousands of dollars to get the matter up to and through trial—i.e. expert reports, depositions, travel, hotel rooms and accommodations for a multi-week trial, getting experts to trial, etc." and that such expenses would exceed any verdict.[399] The district court denied the motion to withdraw, noting the prejudice to the plaintiff, the lawyer's knowledge when they undertook the representation that they might have to engage in expensive litigation, and the additional policy reasons for

392. *See generally* Erichson & Zipursky, *supra* note 30, at 287 (noting that lawyers cannot ethically withdraw if client rejects settlement). *But see* Baker, *Mass Torts*, *supra* note 30, at 1964 (finding Professors Erichson and Zipursky's position unpersuasive).

393. Redlich v. Lanell, No. SUCV200203213C, 2006 WL 1000353, at *33 (Mass. Super. Ct. Mar. 3, 2006); *see also* Donald R. Lundberg, *Fees and Feasibility: Getting Paid*, RES GESTAE, October 2011, at 19, 22.

394. *See* Haines v. Liggett Group, Inc., 814 F. Supp. 414, 422 (D.N.J. 1993).

395. *See* McDaniel v. Daiichi Sankyo, Inc., 343 F. Supp. 3d 427, 432–34 (D.N.J. 2018).

396. 343 F. Supp. 3d 427 (D.N.J. 2018).

397. *Id.* at 430.

398. *Id.*

399. *Id.* at 432.

not permitting lawyers to withdraw if the representation becomes "less lucrative than counsel had once hoped."[400]

As administered now, in transferring a percentage of the fees owed to the IRPAs to the PSCs, common-benefit fees are windfalls to the PSCs. Some courts have reasoned that such a scheme does not result in a windfall because the plaintiffs, individually and collectively, do not pay more than they would have paid their IRPAs (i.e., the common-benefit fees simply reallocate that pool) and, in this way, the fees reflect the actual market value for the total legal services.[401] But this implicitly assumes that lawyers may retain the economies of scale derived from the aggregation.[402] And that assumption is contrary to the underlying ethical norms of the profession. Although it was only considering scenarios involving hourly billing, ABA Formal Opinion 93-379 establishes the general principal that the reasonableness of fees should be considered "not from the perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned" where the lawyer is "obliged to pass the benefits of . . . economies [such as being able to do work for one client while traveling for another or reusing old work product] on to the client."[403] Similarly, any incidental economy of scale or other intervening factor that lowers their expected burden should belong to the client, not the lawyers in an MDL (whether PSC or IRPA).[404] This most obviously justifies cutting fees across the board. In part, Judge Eldon E. Fallon's supervision of fees in the Vioxx MDL turned on this recognition.[405] Ensuring that plaintiffs retain the peace premium and economies of scale has special salience in MDLs given "the reality [] that, once swept into an MDL, plaintiffs lose many of the choices and rights that are the hallmark of individual, and even class action, litigation."[406]

As illustrated by its treatment of economies of scale, the antiwindfall approach evenhandedly applies to both PSCs and IRPAs. And it covers other frequent issues related to the supervision of fees in MDLs. For example, just as the economies of scale rightfully belong to the parties, so too should any peace premium that comes from the parties being willing to settle en

400. *Id.* at 432–34.

401. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2013 WL 1856035, at *4 (E.D. La. Apr. 30, 2013) ("It is because of this distinction between class actions and MDLs—the fact that the primary beneficiary in MDLs is the attorney, rather than the claimant—that 'the common benefit fee is extracted from the fee of the primary attorney and not the claimant' in MDLs.").

402. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2179 (2000); Dawson, *supra* note 332, at 1601–03.

403. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-379 (1993).

404. Curtis & Resnik, *supra* note 325, at 447.

405. *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 555 (E.D. La. 2009); *see also* Burch, *supra* note 4, at 114 (noting that judges reduce fees, in part, because economies of scale create costs savings and "this discount should be passed on to plaintiffs lest their attorneys receive a windfall"); Menkel-Meadow, *supra* note 283, at 1207.

406. Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs' Process: Civil Procedure, MDL, and A Day in Court*, 42 REV. LITIG. 225, 227 (2023).

masse.[407] The antiwindfall principle also addresses lawyers who take on low-risk claims on a contingency fee basis.[408] It is well understood that Model Rule 1.5 permits limiting such fees.[409] As one court reasoned, significant contingency fees usually build in the risk of nonrecovery and, thus, a high percentage is likely unreasonable "when there is no significant uncertainty in the client's recovery."[410] The antiwindfall principle also would permit reducing fees when IRPAs do little or no independent work for clients and those clients were obtained with similarly little efforts.[411] For example, one state court observed that it would be unreasonable to award the full contracted-for contingency fee in a simple case in which the opposing party defaulted or made little defense.[412] Finally, the antiwindfall principle polices the bringing of nonmeritorious claims because nonmeritorious filings are not competent work and, thus, should not require any payment (although, presumably, this should also preclude those clients from recovering anything from the defendants in the first place).[413]

One obvious objection to this approach is that the PSC's fees might be entirely consumed by the additional coordination costs undertaken for the benefit conferred on others. But there are several answers to this. First, under most professional-conduct codes, that is simply the lawyer's tough luck (albeit, tempered by the third point below).[414] Second, if the PSCs have large inventories of clients, they should be able to spread the shared costs across their own stable of clients and might consider the gains in prestige a worthwhile recompense.[415] Third, as under ordinary professional-conduct interpretations (and as Professor Elizabeth Chamblee Burch has previously suggested), the PSCs may be able to seek contribution on a pro rata quantum meruit recovery from the other parties for the work that was not done for the benefit of the PSC's own client.[416] Although this last admission might look like the reinvention of common-benefit fees or a restatement of Professor Burch's proposal, the critical difference is that the professional-conduct

407. *See* Burch & Williams, *supra* note 16, at 1489; Burch, *supra* note 26, at 127–28.

408. *See* Weinstein, *supra* note 358, at 528–29.

409. *See, e.g.*, *In re* Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig., 290 F. Supp. 2d 840, 850 (N.D. Ohio 2003). *But see* ABA Comm. on Ethics & Pro. Resp., Formal Op. 94-389 (1994) (not categorically unethical to charge contingent fee). With that said, the ABA probably got it wrong. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 249 (1996).

410. *See* Redlich v. Lanell, No. SUCV200203213C, 2006 WL 1000353, at *26 (Mass. Super. Mar. 3, 2006); *see also* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 44–46 (2000).

411. *See* Weinstein, *supra* note 358, at 528; *see also* Erichson, *supra* note 410, at 44–46; Walitalo v. Iacocca, 968 F.2d 741, 749 (8th Cir. 1992).

412. *See* Middleton v. PNC Bank N.A., No. 2017-CA-001673-MR, 2019 WL 1224621, at *8 (Ky. Ct. App. Mar. 15, 2019).

413. *See In re* Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., No. 08-MD-2004, 2016 WL 4705807, at *1 (M.D. Ga. Sept. 7, 2016).

414. *See* Moore, *supra* note 30, at 2214.

415. *See* Curtis & Resnik, *supra* note 325, at 443.

416. *See* Burch, *supra* note 4, at 128–35; *see also* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 39 (AM. L. INST. 2000).

framework then controls the PSCs recovery, acknowledging that the surpluses related to aggregated settlements rightly belong to the clients and that the point of the quantum meruit award is only to ensure that the clients do not receive an undeserved windfall. In this way, it could even apply to Professors Silver and Miller's proposal that the lead lawyers should hire and set fees for the lawyers performing common-benefit work.[417]

Quantum meruit awards have long been used by courts to compensate lawyers in situations analogous to MDLs in which the PSCs displace the IRPAs.[418] Such awards "entail a comparative, fact-specific, contextualized evaluation of lead attorneys' work and risk over time as opposed to a flat percentage-of-the-fund tax at the beginning of litigation, which could over- or undercompensate in certain circumstances."[419] Professor Burch's proposal would limit the quantum meruit awards to the "benefit they confer on others beyond the work they would typically perform for their own cases."[420] And these awards would be consistent with the antiwindfall principle: here, it prohibits the clients from receiving "free" legal help.

The professional-conduct rules, however, may require two significant modifications to Professor Burch's proposal. First, Professor Burch suggests that the "total contingency charged to clients should not fluctuate."[421] But, as explained above, the clients are the rightful owners of the benefits of the economies of scale and the peace premium.[422] This point is especially salient when the aggregation is neither voluntary nor for the particular benefit of the plaintiffs, as contrasted with class actions where it would likely be uneconomical for individuals to file individually or to separate the benefits.[423] Second, Professor Burch would permit the use of percentages to determine the quantum meruit award.[424] But quantum meruit awards and percentages are odd bedfellows in that quantum meruit awards have traditionally focused on the opportunity cost of the lawyers' time, rather than the assumption of risk, to determine the fair value of the services.[425]

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417. Silver & Miller, *supra* note 19, at 160–69.
418. Burch, *supra* note 4, at 129–30.
419. *Id.* at 131.
420. *Id.* at 132.
421. *Id.* at 131.
422. *See supra* notes 404–07 and accompanying text. *But see* Burch, *supra* note 4, at 113–15.
423. *See generally* Clopton & Bradt, *supra* note 66, at 1732.
424. Burch, *supra* note 4, at 133.
425. *See generally In re* Powell, 953 N.E.2d 1060 (Ind. 2011) (terms of contingent-fee agreement may have been reasonable at the outset, but the matter so quickly resolved that the lawyer should have realized his fee had become unreasonable); McDonald v. Kijakazi, 635 F. Supp. 3d 721, 724–25 (S.D. Iowa 2022) (describing a windfall in which the lawyer does virtually no work on the case but receives a large contingency fee due to an early settlement); Fischel v. Equitable Life Assurance Soc'y of U.S., 307 F.3d 997, 1007 (9th Cir. 2002) (describing similar risk); W. Media, Inc. v. Merrick, 757 P.2d 1308, 1310 (Mont. 1988) (finding contingency fee excessive in which there was no risk because the contract called for a larger hourly fee or contingency fee); HERR, *supra* note 390, § 14.121 ("A fixed benchmark will often yield fee awards that are excessive for certified class actions in which the risk of non-recovery is relatively small.").

Critics of this Article's proposal likely will suggest that this scheme would undercompensate lawyers and disincentivize them from taking these cases. But the Supreme Court implicitly rejected such an argument in *Evans v. Jeff D.*,[426] and its aftermath suggests that such concerns might be overblown.[427] In *Jeff D.*, the Court permitted a plaintiff to accept a settlement that called for forgoing statutory-entitled attorneys' fees, effectively leaving the plaintiff's lawyer without recompense.[428] Critics were worried that the decision would disincentivize lawyers from taking cases if the fee-shifting provisions were waivable.[429] But, following this decision, plaintiffs' lawyers figured out how to contract around such maneuvering by defendants and there was no significant drop in cases.[430] So too, MDL lawyers could contract around many of the limitations that the professional-conduct rules imply. Although clients would not end up any better than under the existing regime, it would be a more ethical and transparent process.

More categorically, Professor Ratner identified the underlying tension in applying the Model Rules or state variations in the context of MDLs.[431] Model Rule 1.5 provides a laundry list of factors that are specific to the individual lawyer-client relationship.[432] And lawyers in MDLs may have acquired their clients in different ways, performed a myriad of tasks, have differing skill levels, or have clients whose cases likewise vary.[433] Given these issues, Professor Ratner concluded that MDL-wide determinations about the reasonableness of attorneys' fees may not be feasible.[434] This, however, might be less fatal now—the collective knowledge about the various roles of MDL lawyers is much more advanced.[435] As such, it should be easier to create more nuanced but still manageable subgroups beyond just IRPAs and PSCs that would lend themselves to standardized adjustments,[436] particularly if those adjustments are returning any surplus from the aggregation to all of the clients (whether it is an economy of scale or peace premium).[437]

Professor Ratner also noted that the goal of Model Rule 1.5 is to police excessive fees, not accomplish case management goals.[438] This objection is the hardest to answer to the satisfaction of pragmatists. While the

426. 475 U.S. 717 (1986).

427. *See* Silver, *supra* note 20, at 1660–61; Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 221 (1997).

428. *Jeff D.*, 475 U.S. at 721–22.

429. *Id.* at 743 (Brennan, J., dissenting).

430. *See* Davies, *supra* note 427, at 215, 221.

431. Ratner, *supra* note 201, at 83.

432. MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2024); Ratner, *supra* note 201, at 79.

433. Ratner, *supra* note 201, at 80.

434. *Id.* at 83.

435. *See, e.g.*, David L. Noll, *What Do MDL Leaders Do?: Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433 (2020); Curtis & Resnik, *supra* note 325, at 443.

436. *See* Resnik, *supra* note 402, at 2179.

437. *See* Curtis & Resnik, *supra* note 325, at 447.

438. *See* Ratner, *supra* note 201, at 84.

professional-conduct framework does not seem to fundamentally upset the (ethically permitted) financial incentives goal of MDL lawyers, there is no getting around that professional-conduct rules are not designed to accomplish case management goals. It is also true that § 1407's efficiency goals are likely in tension with the goals of the individual clients, which are at the forefront of the concerns embedded within Model Rule 1.5 and the state variations. One answer is that the affirmative law of the professional-conduct rules represents an explicit precommitment to those values that simply trumps the policy goals of a statute silent on procedure.[439] And, as addressed below, the use of these rules has real normative and practical benefits.

D. Benefits of Applying the Framework

There are many advantages that follow from applying professional-conduct rules to MDL courts' management of attorneys' fees. These benefits primarily relate to two characteristics of the professional-conduct rules. The first characteristic is that the rules are formal positive law. The second characteristic is that the rules focus on the lawyers' obligations, not the courts' authority.

As formal positive law, professional-conduct rules come with all the benefits described at the categorical level in Part III. Their use—especially in contrast to ad hoc procedures like common-benefit fees—legitimates the courts' actions and limits individual bias. It also is more transparent, predictable, and uniform than a pure ad hoc procedure. And the deliberation in adoption means that the substantive law should be more democratic with opportunities for policymakers to receive broad feedback from affected parties.

This Article's proposed framework offers a simple solution that (1) avoids the doctrinal morass that defines MDL courts' management of attorneys' fees and (2) is more legitimate.[440] There is no need to strain to shoehorn inapposite equitable doctrines to the MDL context.[441] Instead, as described in Part II.C, all but six district courts have used their local rules to self bind themselves to the professional-conduct rules of either their respective home states or the Model Rules that include Model Rule 1.5 and Model Rule 1.16(b). Further allaying concerns, as noted above, only the Southern District of California, District of Nebraska, District of North Dakota, Western District of Michigan, District of South Dakota, and the Western District of Wisconsin have their own code or none—and, even in those six outliers, their actual practice conforms to their respective home-state rules.

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439. *See generally* Evans v. Jeff D., 475 U.S. 717, 752–53 (1986) (Brennan, J., dissenting) (criticizing the majority decision for ignoring "whether permitting negotiated fee waivers is consistent with Congress' goal of attracting competent counsel").

440. *See generally* Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 330 (2014) ("People reasonably may question the efficacy or legitimacy of courts if they are perceived as being indifferent to achieving accuracy and substantive justice . . . ."); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995).

441. *See infra* Part IV.A.

Along these lines, the Article's proposed approach also avoids many of the problems associated with how several trailblazing MDL courts used ethics norms to supervise attorneys' fees. The early MDL courts failed to rely on positive ethics law, with Judge Fallon merely citing Model Rule 1.5 in *Vioxx* and Judge Donovan W. Frank and Judge Weinstein forgoing discussion of any specific ethics rule at all in *Guidant* and *Zyprexa*.[442] Therefore, their decisions were susceptible to the critique that they were going beyond their lawful authority even though "many of the attorneys subjected to fee caps in *Vioxx*, *Guidant*, and *Zyprexa* did not even bother to challenge [the] existence [of the district courts' inherent authority to supervise attorneys' fees for reasonableness]."[443] But this incorrectly presupposes that the courts had to rely on their inherent authority at all.

Moreover, by anchoring its authority to the professional-conduct rules, a court should reduce the risk of bias affecting the management of attorneys' fees. Model Rule 1.5 and Model Rule 1.16(b) provide a formal framework for assessing the fairness of the allocated fees, which should lead to more robust, authority-centered reasoning that should displace the court's reliance on its intuitions.[444] It also should lessen any bias associated with favoring repeat players.[445] This prophylactic effect is especially important given the gender and racial disparities in PSC appointments.[446]

Similarly, it is well established that "conducting a more detailed analysis will tend to improve the accuracy, transparency and legitimacy of the proceedings."[447] This is especially true where practices are opaque.[448] Here, even though common-benefit fees are almost always available, their existence still might come as a surprise to lay clients (or even lawyers with less experience with MDLs), whereas every lawyer should know the professional-conduct rules governing fee arrangements, structure their compensation to comport with the rules, and be able to explain all of this to their clients at the start of the representation.[449] This familiarity should also aid in reducing compliance costs. Finally, having a clear legal framework should effectuate meaningful appellate review.[450]

Given the concerns about the adequacy of MDL courts' supervision of self-dealing by the PSCs,[451] the democratic adoption of the professional-conduct rules provides a meaningful safeguard. Additionally,

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442. *See* Ratner, *supra* note 201, at 77–78.
443. *See id.* at 75–76.
444. *See generally* Portia Pedro, *Stays*, 106 CALIF. L. REV. 869, 915–19 (2018).
445. *See* Burch & Williams, *supra* note 16, at 1448.
446. Noll & Zimmerman, *supra* note 22, at 1679.
447. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1084 (9th Cir. 2010).
448. Redish & Karaba, *supra* note 97, at 124.
449. *See* Brenna J. Ryder, *Technology v. Tradition: Technology's Impact on State Licensing Models and Legal Ethics Requirements*, 23 J. HIGH TECH. L. 405, 410 (2023).
450. *See* Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 716 (2014); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662.
451. *See* Elizabeth Chamblee Burch, *Diversity in MDL Leadership: A Field Guide*, 89 UMKC L. REV. 841, 843 (2021).

MDL judges only hear from a small group of stakeholders—the lawyers and parties before them, with the former tending to involve repeat players who do "not reflect the diversity of either the bar or American society at large"[452]—and, thus, are not well situated to make the broader policy decisions implicated by the aggressive management of attorneys' fees.

Turning to the second category of benefits, the professional-conduct rules address the lawyers' obligations[453] instead of the court's authority to reduce or reallocate fees.[454] This characteristic comes with two main advantages. First, it should significantly simplify the courts' analyses and coordination issues. Second, it serves as a reminder that lawyers—just like courts—have an important role in ensuring just and efficient litigation procedures.[455]

The prevention of windfall attorneys' fees is a matter of nearly universal positive law, across both state and federal courts—recall that every U.S. jurisdiction has adopted a close-enough variation of Model Rule 1.5 and Model Rule 1.16(b). And these rules do not depend on the contractual arrangements between the lawyers and their clients or lawyers and other lawyers.[456] Accordingly, using the professional-conduct rules to manage attorneys' fees in MDLs should obviate differences between common-fund and common-benefit fees (and the various arrangements that they may entail), reducing the administrative burden on the courts.[457] Additionally, it should reduce the transaction costs (and any concerns similar to those in *Erie v. Tompkins*[458]) that might otherwise follow from an out-of-jurisdiction attorney having to follow the transferee court's formal local rules (or effective practices as is the case with the six outliers).[459] Finally, the uniformity of the applicable law should also answer some of the concerns that have been raised with regard to how federal MDLs should manage common-benefit taxes on lawyers proceeding in state actions.[460] Although the plaintiffs and lawyers proceeding in state court are beyond the formal reach of the federal MDL courts,[461] the principles of comity might encourage

452. *See* Noll & Zimmerman, *supra* note 22, at 1691.

453. *See* Erichson, *supra* note 100, at 1828.

454. *See* Silver & Miller, *supra* note 19, at 111. Professor Ratner has previously considered how professional responsibility rules apply to the award of common-fund fees in MDLs but still focused on the court's control over the lawyers' ethical duties, not the lawyers' responsibility. *See* Ratner, *supra* note 201, at 62–63.

455. *See* FED. R. CIV. P. 1 advisory committee's note to 2015 amendment. *See generally* Herbert v. Lando, 441 U.S. 153, 177 (1979); Bone, *supra* note 2, at 288.

456. *See* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 282 (1977).

457. *See* Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392–96 (1970).

458. 304 U.S. 64 (1938).

459. *See* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2024).

460. *See* Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1368–69 (2014).

461. *See* Zachary Clopton & D. Theodore Rave, *Opioid Cases and State MDLs*, 70 DEPAUL L. REV. 245, 266 (2021).

state courts to rely on the federal MDL courts' determinations given the overlapping authorities and fact patterns.[462]

Another benefit of the focus on the lawyers' obligations is that it should encourage lawyers to police themselves, consonant with Rule 1's explanation of the purpose of the FRCP.[463] To this, ex post sanctions and other court enforcement of procedural rules are likely to be less effective than a culture shift around legal practice discouraging the problems in the first place.[464] Explaining this dynamic, a popular novelist once described a City Watch's response to the formation of a Guild of Thieves:

> The Watch hadn't liked it, but the plain fact was that the thieves were far better at controlling crime than the Watch had ever been. After all, the Watch had to work twice as hard to cut crime just a little, whereas all the Guild had to do was to work less.[465]

The goal of having lawyers self police is especially relevant in MDLs where the courts look to counsel as collaborators in developing ad hoc procedures.[466]

E. Looking Ahead

Given their history, MDLs are best understood as being for the benefit of the judiciary and the broader public rather than the parties (even if defendants might prefer aggregation to avoid the "too many cooks" issue and plaintiffs gain access to elite lawyers and some economies of scale in a world hostile to class actions).[467] Accordingly, this Article's framework seems unlikely to be adopted wholesale by a federal judiciary whose members are insulated from the costs and whose incentives broadly line up with resolving MDLs expeditiously.[468]

Additionally, this Article acknowledges that, after having touted the legal status of professional-conduct rules in district courts, it might have put them at existential risk—at least, regarding MDLs or as constraints on common-benefit fees. If, for example, the Advisory Committee agrees that the district courts' adoption of professional-conduct rules through their local rulemaking creates an irreconcilable tension with MDL management, it could

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462. *See* Myriam Gilles & Gary Friedman, *MDL Drano: Rule 23-Based Solutions to Mass Tort Buildup*, 84 LAW & CONTEMP. PROBS. 121, 131 n.51 (2021) (contrasting *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014), *with In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 617 Fed. Appx. 136 (3d Cir. 2015)). Comity though raises its own administrative issues and might counsel against displacing the *state* courts' authority. *See* Dodge, *supra* note 19, at 360–61; *In re* Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170, 181 n.4 (S.D.N.Y. 2020) (noting issue with potentially conflicting judgments).

463. FED. R. CIV. P. 1.

464. *See, e.g.*, Gensler & Rosenthal, *supra* note 237, at 718; *see also* Rheingold, *supra* note 237, at 396.

465. TERRY PRATCHETT, GUARDS! GUARDS! 51 (2013).

466. Gluck, *supra* note 81, at 1691. *See generally* Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 174 (2018).

467. *See* Bradt, *supra* note 65, at 916.

468. *See* Henderson, Jr., *supra* note 93, at 1021 n.39.

easily draft a stronger Rule 16.1 to displace the local rules.[469] Alternatively, Congress could revise § 1407 to provide for specific compensation schemes.[470] Those, of course, are perfectly reasonable solutions that rest with the institutional actors—i.e., the Rules Committees and Congress—who are charged to make these sorts of high-level policy decisions. Such a path, even if it would conflict with the current professional-conduct rules, is preferable to the status quo. MDLs present profoundly difficult questions about the normative tradeoffs between participation and efficiency that individual courts are ill-suited to resolve.[471]

CONCLUSION

The rules of professional conduct can—and should—be used to fill gaps and safeguard innovations within civil procedure. And, lest this Article be read as anti-innovation, greater integration of the professional-conduct rules within civil procedure might even encourage experimentation. For example, MDL transferee courts could issue standing orders requiring PSCs to regularly communicate with both IRPAs and all the plaintiffs as called for by Model Rule 1.4 and the state variations. Ultimately, this Article concludes with the hope that other scholars, courts, and rulemakers will consider how professional-conduct rules intersect with civil procedure, especially those areas that are left unbounded.

469. *See* FED. R. CIV. P. 83(a); Ratner, *supra* note 201, at 84–85.
470. *See* Ratner, *supra* note 201, at 84–85.
471. *See id.*